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IN THE

Supreme Court of the United States

October Term, 1966
No. 1340

SUNKIST GROWERS, INC.,

Petitioner,

vs.

CASE-SWAYNE CO., INC.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

CHARLES E. BEARDSLEY,
SETH M. HUFSTEDLER,
458 South Spring Street,
Suite 940,
Los Angeles, Calif. 90013,
Attorneys for Petitioner Sunkist Growers, Inc.

DONALD D. STARK,
Law Building,
6th and Main Streets,
Corona, California,

DALE V. CUNNINGHAM,
P.O. Box 2706,
Terminal Annex,
Los Angeles, California,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Sunkist Growers, Inc. hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case, November 21, 1966.

Opinions Below.

The majority and dissenting opinions of the Court of Appeals are reported at 369 F. 2d 449 (1966). Said opinions are attached hereto as Appendix A. The opinion which the District Court rendered in granting a directed verdict is unreported. Said opinion is attached hereto as Appendix B.

Jurisdiction.

The decision of the Court of Appeals for the Ninth Circuit in this case was rendered on November 21, 1966. Petitions for rehearing within the time allowed

therefor by rule of the Court, were filed by Case-Swayne Co., Inc. on December 16, 1966, and by Sunkist Growers, Inc. on December 22, 1966. Both of said petitions were denied by the Court of Appeals on January 12, 1967. An application for an extension of time in which to file this petition was filed with the Clerk of this Court on April 11, 1967, and was granted by Mr. Justice Douglas on April 12, 1967, extending the time in which to file this petition to and including May 1, 1967. The jurisdiction of the Supreme Court is invoked under the provisions of 28 U.S.C. §2101(c), and the provisions of Rule 22.4 of the Revised Rules of the Supreme Court of the United States.

Questions Presented for Review.

1. May product oranges produced in California and Arizona be a relevant market for purposes of determining the possible existence of a monopoly under §2 of the Sherman Act where (a) product oranges have value only because they can be processed into products which are sold in a national products market; (b) California and Arizona produce only approximately 10% of the product oranges, the products from which are marketed in such national market; and (c) the price at which product oranges may be sold in California and Arizona is limited by the national products market?

2. Under such circumstances, what are the tests for determining the relevant market under §2 of the Sherman Act where a derivative market is involved?

3. Can different tests be used to define a submarket which is proposed as the relevant market in a monopoly case so as to produce a market which is so narrow that it is not subject to monopolization?

4. Are the criteria for determining relevant market under §7 of the Clayton Act necessarily the same as those under §2 of the Sherman Act?

Statutes Involved.

This case is based upon alleged violations of §2 of the Sherman Act, and is maintained under the provisions of §4 of the Clayton Act. Those statutes are as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding Fifty Thousand Dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court." (15 U.S.C. §2.)
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U.S.C. §15.)

The exemption from the antitrust laws for the organization of agricultural cooperatives on which Sunkist relies is found in §1 of the Capper-Volstead Act, which provides in relevant part as follows:

> "Persons engaged in the production of agricultural products as . . . fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers. . . ." (7 U.S.C. §291.)

Statement of the Case.

The jurisdiction of the District Court was based on §2 of the Sherman Act and §4 of the Clayton Act (15 U.S.C. §2, and §15.)

It is the plaintiff's claim in this case that Sunkist has monopolized and attempted to monopolize product oranges grown in California and Arizona. Product oranges are those oranges which cannot be sold as fresh fruit directly to the consumer, and they are therefore manufactured into various orange products.

The District Court held that there was no evidence which would support a finding that product oranges grown in California and Arizona constituted a relevant market, but that, on the contrary, the relevant market was national. Sunkist had only about 7% of the market,

and therefore could not have monopoly power. The Court granted Sunkist's motion for a directed verdict at the close of the plaintiff's case. The evidence on which the present petition is based is therefore limited to the evidence produced by witnesses called by the plaintiff. Sunkist has not put on its defense.

The Court of Appeals held that product oranges grown in California and Arizona might constitute a relevant market or submarket, and that the jury might find that Sunkist possessed monopoly power in this area. This petition questions the validity of that holding.

The plaintiff manufactures canned, single strength orange juice and orange-grapefruit juice blends from product oranges grown in California and Arizona. The manufacture of such juices, however, is only one of the many products for which the plaintiff uses its canning and packing facilities.

Other manufacturers use product oranges for different purposes. Many of them produce frozen concentrated orange juice. Sunkist manufactures orange products, including juices, concentrates, blends, juice bases, oil, pectin, pharmaceuticals, and cattle feed (ground up pulp), except that Sunkist has not produced canned single strength orange juice in competition with the plaintiff since 1956.*

The Sunkist System is a federated agricultural cooperative engaged in the processing and marketing of citrus fruits grown in California and Arizona. In its basic marketing agreement it undertakes to market all of

*The years involved in this lawsuit are the crop years from 1954-55 to 1961-62.

the citrus fruit of its grower members. This normally includes the picking, washing, sorting, grading and packing of the fruit, the making of the necessary arrangements for shipment to market, and the marketing of the fruit in local, national and international commerce. With respect to product oranges, the Orange Products division of Sunkist maintains extensive facilities for processing these oranges into a wide variety of orange products. It also handles the sales to commercial processors, such as the plaintiff of those oranges it does not process.

Sunkist has no shareholders, and it is not a profit making corporation. All proceeds from its operations, after the payment of costs, are ultimately returned to the grower. Both the District Court and the Court of Appeals held that Sunkist was qualified under the Capper-Volstead Act (7 U.S.C. §291); as such, it is authorized to engage in the collective "processing, preparing for market, handling and marketing" of the fruit of its grower members.

Oranges are grown in four producing areas in the United States. These are California, Arizona, Texas and Florida. The production of oranges in Florida far exceeds that of all of the other producing areas in the United States combined. During the years involved in this lawsuit, Florida produced an average of 73,200,000 boxes of product oranges per year. California and Arizona, on the other hand, produced an average of 8,500,000 boxes of product oranges per year. As a result of this great disparity in production figures, all of the witnesses expressed the view that market conditions in Florida exerted a decisive effect upon the price of product oranges throughout the country. This view was forcefully stated by Mr. Robert McCracken, the

president of Treesweet Products Company, a company which manufactured orange products in both California and Florida:

> ". . . the United States has a total number of boxes of oranges available. Your economics for the crop, the value of the crop, must follow the total supply of oranges. If there is a few, the prices go up, and if there are many, the prices go down.
>
> The Court: In other words, it is one national market and what happens in California affects Florida, and what happens in Florida affects California prices, isn't that true?
>
> The Witness: Yes, this is correct.
>
> By Mr. Beardsley: Q. And isn't it true that Florida is the dominant factor because, for example, I suggest to you that in the year 1959-1960, California-Arizona produced 32.3 million boxes out of a total of 129.6 million boxes of the total of the United States? A. Yes." [Rep. Tr. p. 253, line 16, to p. 254, line 7.]

All of plaintiff's witnesses who testified on this point agreed with this view. However, the reason that Florida dominates the market in California is not that Forida oranges can economically be shipped to California, for the plaintiff's evidence showed that this could not be done. The evidence did show, however, that Florida orange products are sold in California in direct competition with orange products manufactured in California.

Product oranges have no value except to the extent that they can be manufactured into orange products. If the demand for orange products declines, the demand

for product oranges will likewise decline. The price of product oranges in California and Arizona is therefore closely related to the supply of product oranges in Florida, and in fact throughout the country.

The plaintiff and the Court of Appeals, however, apparently felt that the convenience and availability of product oranges to plaintiff was a key test here. The Court of Appeals said

> "It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well defined submarket which constitutes the relevant market for antitrust purposes, which (3) must correspond to the commercial realities of the industry, (4) is affected by price disadvantages due to transportation costs, (5) is affected by availability of a buyer to supply and existence of economic areas which significantly impede competition, (6) is determined in part with relation to the parties affected in the suit, and (7) is a question of fact in the particular case." (369 F. 2d 449, 456.)

We believe that these tests are utterly inappropriate in a case such as this. The fact that buyers in California and Arizona cannot buy product oranges in Florida does not mean that the sellers of product oranges in California and Arizona are free to set their prices at any level they choose. The facts show the contrary is true. Thus, the tests used here by the Court of Appeals produced a "relevant market" which is not subject to monopoly power.

Even if the attention of the Court is focused exclusively upon the supply of oranges in California and Arizona, without regard to the demand side of the

market, there was no evidence that Sunkist possessed the power to control prices or exclude competition.

Sunkist has no control over the supply of oranges grown in California and Arizona. Sunkist does not grow oranges, and it has no control over the amount of oranges grown by its members. Nor does Sunkist have any indirect means of controlling the supply of oranges, such as control over sources of credit or of nursery stock, or of land or water. There was no evidence to indicate that producing acreage was unavailable, if the plaintiff had desired to purchase it, or that there were other types of entry barriers which would have prevented the plaintiff from producing its own oranges. Sunkist is obligated by the agreement with its members to sell, or process and sell, all oranges produced by its growers, regardless of the amount produced. [Ex. 1, para. 6.]

The evidence did indicate, of course, that Sunkist had the power to determine how its own members' product fruit should be marketed. In this connection, several courses of action were open. The product fruit could be sold to commercial processors, such as the plaintiff. To the extent permitted by the capacity of its processing facilities, such fruit could be processed into various orange products by Sunkist. (The evidence indicated that the returns to Sunkist's grower members were lower on the fruit it had to sell to commercial processors than on the fruit it was able to process in its own facilities. Compare Ex. 151 with Ex. 118.) Other methods of disposition were also available. However, the various distribution methods did not affect the total supply of oranges available in California and Arizona.

The Court of Appeals stated that Sunkist controlled approximately 67%* of the product oranges grown in California and Arizona.

The remaining product oranges in California and Arizona, approximately 35%, are completely outside the control of Sunkist. The Court of Appeals stated that approximately 18% of the product oranges grown in California and Arizona were controlled for their own use by other small cooperatives. There is nothing in the record, however, to indicate that the actions of these other cooperatives were influenced by the actions of Sunkist in any way.

On the basis of these facts, the Court of Appeals held that a jury could have found that the submarket of California and Arizona was the relevant market, and that Sunkist had monopoly power in that market. Petitioner asserts that both of those conclusions are unsound.

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*This figure is based on plaintiff's Exhibit 126, Plaintiff's Exhibit 92 showed that Sunkist's average control was 62.40% of the product oranges grown in California and Arizona; that its percentage never exceeded 65% and that in 1957-58, its percentage dropped to 54.69%. The percentage for each year involved in the lawsuit shown by plaintiff's Exhibit 92 is as follows:

Years	Sunkist percentage
1954-55	64.941%
1955-56	63.5945%
1956-57	60.729%
1957-58	54.6923%
1958-59	62.054%
1959-60	63.604%
1960-61	61.933%
1961-62	62.250%
Average	62.40%

THE REASONS FOR THE GRANT OF CERTIORARI.

I.

This Case Presents New Issues of Fact and Law in the Application of §2 of the Sherman Act.

1. This proceeding involves a derivative market (that is a market in which the entire demand for the product is derived from a second market). The unusual economic problems presented by this type of market have not previously been considered by this Court.

2. The Court of Appeals apparently declared that a relevant market for purposes of §2 of the Sherman Act may be divided into submarkets (a question which was left open by this Court in *United States v. Grinnell Corp.* (1966), 384 U.S. 563, 573), and that a submarket may be used as the relevant market to determine whether or not a monopoly exists, even though that submarket does not meet the tests laid down by this Court in *United States v. E. I. du Pont and Co.*, 351 U.S. 377. The *du Pont* case held that a relevant market for Sherman Act purposes must be a market which is sufficiently isolated so that it may be controlled by the defendant.

3. In defining the relevant market, the Court of Appeals applied many of the market definition tests used under §7 of the Clayton Act, without regard to the different standards of the Sherman Act. Thus, the Court focused on the market alternatives of the com-

mercial processors—which would be appropriate in a §7 case—rather than the market power of the defendant. In some cases this might make no difference; in this case, because of the derivative nature of the market, it makes a critical difference.

In short, this case presents an economic problem which we believe has not previously been considered by this Court; the Court of Appeals has applied mechanical tests designed for other types of markets which, when applied here, produced a "relevant" market which does not fit the commercial realities, and, because it is based on §7 submarket tests, is not subject to monopolization.

Since the commercial realities lie at the heart of this case, we believe that a detailed exposition of the undisputed facts is appropriate:

II.

The Plaintiff's Evidence Established the National Market in Product Oranges.

A. Florida Produces About 90% of the National Supply of Product Oranges.

The testimony shows that Florida produces about three times as many total oranges as California and Arizona combined. However, 75 to 85% of the Florida crop is manufactured into orange products while only about 15% of the California crop is used for orange products. Thus, the California-Arizona production of product oranges is on the average only about

10% of the total national production of product oranges, as shown by the following chart*:

Year	All oranges Produced in Florida	Florida Product Oranges 80% of First Column	Calif-Ariz Product Oranges	Calif-Ariz Percentage of Total
1954-5	88.4	70.7	11.9	14.4%
1955-6	91.0	72.8	11.1	13.3%
1956-7	93.0	74.4	9.6	11.4%
1957-8	82.5	66.0	3.9	5.6%
1958-9	86.0	68.8	11.1	13.9%
1959-60	91.5	73.2	8.6	10.5%
1960-1	86.7	69.4	6.0	8.0%
1961-2	113.4	90.7	5.6	5.8%
8-year Average	91.6	73.2	8.5	10.4%

Sunkist, of course, operates only in California and Arizona, and has an average of 63% or 67% of the product oranges there. Sunkist, therefore, has only about 7% of the national production of product oranges.

B. The Price of Product Oranges Throughout the Country Was Controlled by National Supply and Demand.

All of the witnesses who testified on this point agreed that the market price for product oranges was determined by the national supply and demand, and that Florida was the dominant factor.

The first witness called by the plaintiff was Mr. Robert McCracken, the President of TreeSweet Products Company. TreeSweet manufactures orange products in

*The above figures are stated in millions of boxes. The Florida orange production is shown in Exihibit 9, and the California-Arizona product orange production is shown in Exhibit 92. The figures relating to the production of Florida product orange are based on the testimony of Mr. Wendell McCracken, that 75 to 85% of the total Florida orange production was devoted to orange product uses.

both California and Florida, and so he was able to testify concerning the relationship between the two markets. He testified that:

> ". . . the United States has a total number of boxes of oranges available. Your economics for the crop, the value of the crop, must follow the total supply of oranges. If there is a few, the prices go up, and if there are many, the prices go down.
>
> The Court: In other words, it is one national market and what happens in California affects Florida, and what happens in Florida affects California prices, isn't that true?
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> The Witness: Yes, this is correct.
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> By Mr. Beardsley: Q. And isn't it true that Florida is the dominant factor because, for example, I suggest to you that in the year 1959-1960, California-Arizona produced 32.3 million boxes out of a total of 129.6 million boxes of the total of the United States? A. Yes." [Rep. Tr. p. 253, line 16, to p. 254, line 7.]

Morgan Ward, who had been engaged for many years in selling product oranges for a number of independent producers in California, testified as follows:

> "Q. [By Mr. Beardsley]: Is it not also true that during all of this time you gave considerable thought to the conditions in Florida, such as whether it was a short crop year or whether there was an abundance of Florida fruit, and what the prices of Florida products were in California, in arriving at the price which you placed on your product oranges which you sold in California?
>
> A. That is true.

Q. It is not true that you considered that *the principal factor affecting the prices in California, both Sunkists and everybody elses', the Florida influence—is that not true, sir?* A. *It is the principal factor over all the United States.*" [Emphasis added; Rep. Tr. p. 389, lines 10-23.]

Morgan Ward also testified as follows:

"Q. In other words, if there is a short crop in California, and consequently California prices for product fruit rise, this has some effect on prices throughout the country, does it not? [Objection, overruled.]

The Witness: I would say in a measure, yes. If you had a short crop in California, in a measure.

[By Mr. Beardsley]: Q. Let me take the converse situation. Suppose there is a freeze in Florida, as there was in, I think either '62 or '63, and a very short crop in Florida, does that not in great measure affect the price of California product oranges in that season? A. More so than California would have on Florida. It is like the big dog and the little dog." [Rep. Tr. p. 390, line 17, to p. 391, line 9.]

Mr. Robert McCracken of TreeSweet testified unequivocally to the same thing.

"Q. Have you found over the years that the quantity of Florida products fruit available has a direct bearing on both the prices, the prices of both products, the canned goods and the product oranges in California?' A. Yes.

Q. Isn't it actually the major factor that affects the price of both products and product oranges in California? Isn't the Florida production and price the major factor? A. Florida, by reason of the fact that it grows many more boxes of oranges than California, is the dominant economic factor, Yes." [Rep. Tr. p. 248, line 16, to p. 249, line 1.]

Morgan Ward testified as follows about the importance of Florida production:

"Q. Is it your opinion, then, that the market conditions with respect to Florida product oranges had more effect on the price of product oranges in California than any one factor? A. They have effect on the overall United States. . . .

Q. I am particularly interested now in your view about the importance of the Florida— A. I think it is of great importance." [Rep. Tr. p. 392, lines 2-17.]

Mr. Robert McCracken discussed the Florida freeze which took place in December, 1962.

"Q. How did that affect the prices in California? A. All citrus prices generally went up after the Florida freeze due to the scarcity of supplies." [Rep. Tr. p. 246, lines 7-9.]

Mr. McCracken went on to testify as follows:

"Q. My question to you, does that sort of shortage resulting from an unnatural condition, a condition of freeze, the freeze in Florida, affect the price at which you could sell your California products? A. Yes, Sir, it would have an effect." [Rep. Tr. p. 247, lines 2-6.]

Mr. McCracken also testified as follows:

"The Court: You said it would affect the market. You were talking about the retail market. Now, would it [a freeze] affect the market concerning the supply of surplus fruit in California?

The Witness: Yes, generally, it would.

Q. [By Mr. Beardsley]: What effect would it have? A. It would generally raise it.

Q. Have you found over the years that the quantity of Florida products fruit available has a direct bearing on both the prices, the prices of both products, the canned goods and the product oranges in California? A. Yes." [Rep. Tr. p. 248, lines 3-20.]

C. Products Produced in Florida Compete Directly With Those Produced in California.

Moreover, the evidence showed that these California-Arizona oranges were in direct competition with Florida oranges for the consumer dollar in California. For example, Robert McCracken, the president of TreeSweet, testified that they shipped 45 to 50% of their Florida juice to the West Coast, mostly to California. [Rep. Tr. p. 268, lines 16-21.]

Other manufacturers also sold Florida juice in California.

"Q. Do other brands of Florida single strength juice find their way into the market here in the West? A. Oh, yes. . . .

Q. What other brands are there from Florida? A. The better known ones would be Del Monte, Libby, Stokeley." [Rep. Tr. p. 119, lines 3-10.]

Mr. Robert McCracken also testified that the California and Florida products could not be separated from a competitive point of view.

> "Q. Does Del Monte pack California single strength juice? A. Florida.
>
> Q. I was talking about the leader in the price in California single strength juice. A. You can't separate the two as long as Del Monte and Tree-Sweet are in the market, on the shelf, whether it is Florida or California. We both sell to the consumer in Los Angeles." [Rep. Tr. p. 294, lines 4-12.]

He had testified to the same fact earlier in the trial.

> "Q. [By Mr. Harmon] It is competitive—I don't mean particularly pricewise, although that is also an element—with single strength juice packed in Florida? [Objection, overruled.]
>
> The Witness: Of course the two products do compete pricewise, the two products are sold off the same grocery shelves in California." [Rep. Tr. p. 88, line 12, to p. 89, line 6.]

Mr. Amos Swayne, President of the Appellant corporation, confirmed the competition between California and Florida products. In answer to questioning by Mr. Henderson, he testified as follows:

> "Q. Now is Florida canned single strength orange juice sold in California and the Western states? A. Yes.
>
> Q. Can you name some of the brands? A. Del Monte, Stokeley, Libby—those are national brands of Florida orange juice that are sold in this market and other markets throughout the country.

Q. Is this plaintiff's Exhibit No. 125 [a can of plaintiff's single strength orange juice] the orange juice that is sold in competition with brands you mentioned on the shelves of the grocers? A. Yes, it is." [Rep. Tr. p. 487, lines 15-25.]

Not only could Florida juice be sold in California in direct competition with California juice, but the Florida manufacturers were able to undersell California manufacturers in the California market.

"Q. So, in spite of the fact that you and other Florida producers pay this high cost [81¢ per case] to bring your products to California, it still can be sold for less than the California juice, can it not? A. This is generally true." [Rep. Tr. p. 270, lines 10-14.]

The effect of Florida production on California prices is dramatically illustrated by market conditions in 1957. The plaintiff started 1957 with a price of $3.80 per case. In February its prices were raised to $4.00 per case. On March 28, 1957, Paul Case wrote the following memorandum to Amos Swayne:

"Bob McCracken [Sales Manager of Tree-Sweet] says market broke in Florida this last weekend. Orange juice sales down 19%—pack up."

By Mr. Beardsley:

Q. Pardon me. What does he mean by 'pack up'? A. Pack increase. A large pack.

Q. More Florida juice was coming on the market? A. Apparently.

Q. Sales were down 19 per cent; right? A. Yes, right.

. . .

"Q. Just going back, Pasco is a Florida juice, is it not? A. It is, yes.

Q. And its price was 2.45 for the same case which you were then selling for $4.00, is that right, or delivered in California at 3.23? A. That's correct.

Q. The same case you were then selling for $4.00? A. That's correct.

Q. So you recommended to Amos Swayne— A. Yes.

Q. —That your current price be reduced from $4.00 to $3.70? A. That's right." [Rep. Tr. p. 888, line 21, to p. 891, line 14.]

On March 29, 1957 Paul Case wrote to Mr. John Tiedemann, a jobber of Case-Swayne products in Northern California:

"Dear John:

Amos and I have gone over the current Florida situation and have adjusted our prices as much as we can do so. The price cuts are very severe, based on our present costs and we will be taking a loss, but will go along on the following basis for the present." [Rep. Tr. p. 897, lines 14-21.]

On April 5, 1957 Paul Case wrote the following letter to Mr. Markowitz:

"Dear Harry:

In consideration of the lower Florida prices, we are pleased to revise your prices to the following . . . ." [Rep. Tr. p. 894, lines 20-23.]

Mr. Case testified that they had in fact lowered their prices because of the Florida competition.

> "You did make a change in your product prices due to the Florida prices in April, 1957, did you not? A. Quite apparently, Yes." [Rep. Tr. p. 895, lines 1-3.]

On May 6, 1957 Paul Case wrote the following memo to Case-Swayne:

> "Talked to Bob Boheim, Treesweet, Friday morning and he said that they received word Friday that Pasco had reduced the prices of orange concentrate from $1.25 to $1.00 per dozen. He said that independent packers were losing money on the price of $1.35 per dozen and that somebody is liable to go bust. He also said that so far there have been very few Valencias harvested due primarily to the market conditions. With this situation developing, the growers will have to reduce their prices appreciably before there will be any volume pack. This no doubt means that single strength orange juice will be selling on a much lower level than it is today." [Rep. Tr. p. 904, lines 8-22.]

Mr. Case testified that the plaintiff had again reduced its prices in May, 1957:

> ". . . we gave much less weight to the price of concentrate than we did to other factors, including the price of single strength orange juice in Florida." [Rep. Tr. p. 905, line 23, to p. 906, line 1.]

There was no improvement in the Florida production picture in June.

"Ade McNamara says the Florida market is very sloppy. Many oranges are going on the ground in Florida and they think the early pack of sweetened orange juice has killed the hot pack [canned single strength] business." [Rep. Tr. p. 913, lines 19-23.]

D. Florida Production Costs Were Lower.

One of the reasons for the effective competition from Florida products was that the cost of producing oranges in Florida is less than in California:

"By Mr. Beardsley: Q. I intended to ask whether all of these costs, land, taxes, less irrigation, higher cost of labor to cultivate, higher cost of labor to pack, higher cost of labor to wash, process, can and so on, I took all of those things into consideration, and in each one of those the cost was lower in Florida than in California. A. Right.

Q. The first part of which, land, water, taxes, cultivating, picking, go into what fixes the cost of the fruit, is that correct? A. That is correct." [Rep. Tr. p. 274, lines 7-17.]

E. The Price a Processor Can Pay for California Product Oranges Is Limited by the National Product Market.

Thus, the evidence in this case showed beyond any reasonable doubt that the price which could be obtained for oranges by the grower depended upon national market conditions. Even the president of the plaintiff corporation testified that this was correct. In 1956 and

1957 Sunkist sold product oranges on a bid basis. All commercial processors, including the plaintiff, were invited to bid. The plaintiff submitted bids on the first two lots of oranges offered for sale, but did not bid on lot No. 3:

> "The reason we did not make a bid on this particular bid, on offer No. 3, was that the prices under the bid system wre continuing to go up and we made evaluations at that time, *based on the supplies of fruit in Florida* and the prices at which the bids were going, and it was our decision at that time to make [no] further bids—or to bid on this bid at higher prices would be highly speculative on our part." (Emphasis added.) [Rep. Tr. p. 579, lines 17-24.]

Any purchaser of product oranges had to follow the same procedure. He had to determine what price he could get for his orange products in the national market. That market was dominated by Florida production. If he could buy oranges at a price which permitted his products to compete with Florida production, he would buy. But if he could not buy oranges at that price, he did not buy.

Sunkist, and the other sellers of product oranges in California and Arizona could therefore not raise their prices above that regulated by the national market. If they did, the sales stopped and they had unsalable oranges.

F. The Record Would Not Support a Finding That Sunkist Controlled the Price of Product Oranges in California and Arizona.

The only testimony in the record designated to show that Sunkist controlled prices of product oranges in California was that of Morgan Ward in one answer. He had already testified (as quoted in emphasis, paragraph IIB above) that Florida production was the principal factor determining California prices including Sunkist's prices and had compared Florida and California as the "big dog and the little dog" He was then asked:

"By Mr. Beardsley:

"Q. Is it your opinion, then, that the market conditions with respect to Florida product oranges, have more effect on the price of product oranges in California than any other one factor? A. They have effect on the overall United States. Then those who set prices on the fruit in California look at what is going on all over the United States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. But the price of byproducts in this State has, ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time." [Rep. Tr. p. 392, lines 1-14.]

The clear meaning of this testimony is that Sunkist set the price within the guidelines of the national market. Sunkist's price was not the controlling factor; it was, as this witness pointed out, controlled by national supply and demand.

III.

The Basic Test of Monopoly Is the Power to Control Price and Eliminate Competition.

A. The Case Law Has Consistently Recognized This Test.

Section 2 of the Sherman Act is intended to prohibit the possible exploitation of the market for the unfair or unreasonable aims of the claimed monopolist. The courts have consistently laid down the basic test to determine whether or not a monopoly exists: Does the claimed monopolist have the power to control the price or to eliminate competition? Regardless of the technique used to reach a conclusion, if the claimed monopolist has that power, he has a monopoly; if he does not have that power, he does not have a monopoly.

The Court of Appeals, of course, was well aware of this general test for monopoly power, and stated the rules as follows:

> "The cases uniformly hold that 'a party has monopoly power if it has, over "any part of the trade or commerce among the several states", a power of controlling prices or unreasonably restricting competition'. *United States v. E. I. du Pont de Nemours & Co.*, 1956, 351 U.S. 377, 389. . . ."

B. A Market Is Not Subject to Monopoly Unless It Is Sufficiently Isolated From Other Commerce That Prices Can Be Controlled or Competition Eliminated.

A necessary corollary to the basic test for monopoly is that a market may not be monopolized unless the powers of monopoly can be generated. Many markets are not subject to monopoly, because they are not subject to control for various reasons.

1. *Geography.* A market cannot be monopolized if it is not sufficiently isolated in space. As an example, control of the entire egg supply of the District of Columbia would not give any monopoly power because if prices were raised, eggs would immediately be shipped in from the surrounding area. No degree of control in such an area will give power over price.

2. *Products.* A market cannot be monopolized unless it includes all of the products for which there is high cross-elasticity of demand or supply. If products A and B are substitutes, raising the price of A will be ineffective because customers will purchase product B. The proposed monopolist must control all of the products which compete to generate monopoly power. No degree of control over product A will give control over price.

3. *Derivative markets.* Whether or not a market may be subject to monopoly may also depend upon whether it is a primary or a derivative market. A derivative market is a market for materials which have no immediate value to the consumer, but which may be processed and sold to the ultimate consumer.

The market for product oranges is a derivative market. Product oranges have no value *per se.* (They are product oranges because they cannot be sold as fresh oranges.) They have value only because they may be processed into orange products, and may then be sold in the *products* market.

The price of product oranges therefore must be a reflected price, dependent upon the price which can be obtained for the products. The supply and demand for orange products will determine the price of orange products. The price which can be obtained for product oranges will therefore be limited to the price which will enable a person to pay for the oranges, process them, and sell the products in the products market.

Depending on the facts of the particular market, control of a substantial part or even all of the goods sold in a derivative market may give no monopoly power at all. The price is limited by the products market and no degree of control will give power over price. In each case the test must be: Does the claimed monopolist have the power to control the price or eliminate competition?

4. *Other factors.* There are, of course, many other facts which affect whether or not a monopoly exists. Many agricultural products, for example, raise special problems because the immediate supply depends on weather, climate, and other factors outside of anyone's immediate control.

But there can be no escape from the conclusion that some markets may be monopolized and others may not. *The market must be sufficiently isolated and free from outside limitations before it can be monopolized.*

These considerations have led to the development of the concept of relevant market as a tool in determining whether or not a monopoly exists.

IV.

The Concept of "Relevant Market" Is Only a Tool in Determining the Possible Existence of a Monopoly.

Although the basic tests for monopoly do not require a determination of the relevant market, courts have found the determination of the relevant market helpful in evaluating the economic power of the claimed monopolist.

A. Relevant Market Approach.

A technique which has been developed in many cases is to define the market in which the products involved actually compete. By considering cross-elasticity of demand, actual competition, suitable substitutes, and dozens of other factors, the courts have generally been able to determine an effective market in terms of product, space, and time within which the particular product involved competes. The relevant market, however, must be a market subject to monopoly. If the market is too narrowly restricted by product, geography or otherwise, it will not be subject to monopoly.

Once the relevant market has been defined, the courts have next examined the share of that market controlled by the alleged monopolist. Attempts have been made to create a rough scale to get an idea as to whether or not a monopoly may exist. For example, in *United States v. Aluminum Company of America,* 148 F. 2d 416, 424, Judge Learned Hand observed, after having defined the relevant market, that "That percentage [90%] is enough to constitute a monopoly; it is doubtful whether 60 or 64% would be enough; and certainly 33% is not."

B. United States v. Du Pont Illustrates the Relationship of Relevant Market to Monopoly.

The *du Pont* case, 351 U.S. 377, wrestled with the problem of relevant market. After laying down the basic tests for monopoly (control of price, elimination of competition) the Court searched for the relevant market. *Du Pont* produced about 75% of the cellophane in the United States. If cellophane were the relevant market, du Pont might have a monopoly; if all flexible wrapping materials constituted the relevant market, its percentage was small, and it could not have a monopoly.

The argument in that case (and the division between the majority and minority) was not over the principles just stated, but on the question as to what constituted the relevant market. The majority concluded that du Pont did not have power to fix prices and eliminate competition in cellophane because of the competition from other wrapping materials. Therefore, the relevant market was held to be all flexible wrapping materials. The minority felt that du Pont had the power to set the price of cellophane and therefore cellophane was the relevant market. (See 351 U.S. 377, 422.) But all agreed on the key test: did du Pont have the power to control the price.

C. The Relevant Market Approach Is Not a Substitute for the Basic Tests.

Relevant market is a helpful tool in evaluating a claimed monopoly, but it must conform to the economic realities. If the market defined is not sufficiently broad

so that it can be subject to monopoly, the approach is valueless. The relevant market is simply a tool for analysis; it is not a substitute for analysis.* Thus, the definition of any relevant market can and must be tested by applying the criteria of control of price or elimination of competition.

To put it another way, if the Court had tentatively reached the conclusion in the *du Pont* case that cellophane was a relevant market, and had then applied the ultimate test as to whether or not controlling substantially all of the cellophane production would permit du Pont to raise prices unreasonably, the Court would have observed that the prices still could not be controlled because of competing products. Therefore, on these facts, a relevant market consisting only of cellophane would have been artificial, because it is not a segment of commerce sufficiently isolated to permit monopolization.

The purpose, therefore, of defining relevant market is to try to determine on area of competition which is sufficiently isolated to enable the alleged monopolist to control the price or eliminate competition. If we make an error in restricting the relevant market, to a segment which is not really isolated, then control of that market can have no real economic effect constituting a monopoly.

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*Compare the situation in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), where the District Court held that no relevant market existed, and that the merger involved could not violate §7 of the Clayton Act. This Court, in reversing, held that the decisive question was whether the merger did in fact tend to lessen competition, and that tests relating to the relevant market could not be substituted for the tests prescribed by the statute.

V.

The Relevant Market Concept Applied to Section 2 of the Sherman Act Is Not Necessarily the Same as the Concept Applied to Section 7 of the Clayton Act.

1. Sherman Act.

Section 2 of the Sherman Act prohibits a monopoly of "any part of the trade or commerce among the several states or with foreign nations. . . ." (15 U.S.C. 2.) The concept of relevant market is material only to determine whether or not the alleged monopolist has the necessary power to exploit the market and therefore to monopolize the product. It is not discussed in the statute.

2. Clayton Act.

The test under §7 of the Clayton Act is quite different. It provides that there shall be no acquisition of a business or interest in a business "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C. §18.)

In dealing with the concept of a monpoly, the entire "relevant market" must be treated, because it is only by controlling the entire relevant market that monopoly power may be created. However, under the Clayton Act, monopoly power need not exist; the acquisition needs only "substantially to lessen competition." Thus, whether or not it creates a monopoly or even tends to create a monopoly, the acquisition is prohibited if it lessens competition.

Furthermore, the section itself clearly contemplates submarkets: it deals with "any line of commerce" and

in "any section of the country." There is no requirement that any such part of a line of commerce be subject to monopoly.

3. Contrast.

On reflection, therefore, the "relevant market" referred to in the Clayton Act cases may or may not be the relevant market material in the Sherman Act cases. The requirements are less in the Clayton Act, and therefore the market may be divided, and submarkets dealt with, where it would be inappropriate under the Sherman Act.

Placed in the context of the *du Pont* case, the difference becomes readily apparent. In that case du Pont controlled about 75% of the cellophane production and Sylvania controlled the other 25%. It is apparent that if these two corporations merged, they would not necessarily obtain a monoply, because this Court has already told us that the power to control the cellophane market is limited by competition from other wrapping materials. However, can there be any question that such a merger would "substantially lessen competition"?

The result, therefore, is that the market definition question is not a critical question under §7 of the Clayton Act. Even in exploring the possible liability created where the acquisition "tends to create a monopoly", the definition of relevant market need not be one which includes all of the products which potentially compete. Cornering all of the cellophane market might well "tend to create a monopoly" if cellophane is a substantial part of the flexible wrapping materials market, even though controlling all of the cellophane does not constitute a monopoly.

VI.

The Court of Appeals Incorrectly Applied the Concept of Relevant Market to This Case.

A. The Court of Appeals Incorrectly Applied the Submarkets Rule of the Clayton Act Cases to This Case Under the Sherman Act.

The Court of Appeals apparently reached the conclusion that after a relevant market is determined as in the *du Pont* case, it may be possible to break it down into submarkets for consideration of §2 of the Sherman Act.

> "It seems clear from the decided cases that (1) while the outer limits of the market may be determined by the competition of interchangeable products, (2) there may be a well-defined submarket which constitutes the relevant market for antitrust purposes. . . ." (369 F. 2d 449, 456.)

The Court speaks of various tests, but not the *du Pont* tests. In a monopoly case, the object is to determine a market which is subject to monopoly. These tests cannot then be ignored in breaking the market up into smaller fractions, or the whole object of defining the relevant market is lost.

Reliance was placed on two passages from *United States v. Grinnell,* 384 U.S. 536 (369 F. 2d at 454 and 455). Those passages do not equate relevant markets under the two statutes. Neither *Grinnell* nor any other authority with which petitioner is familiar does that.

The new doctrine now laid down is that the initial relevant market should be defined in the *du Pont* tradi-

tion. But once the overall market is defined, the Court will apparently permit a segment of the relevant market to be used, based on other considerations. That may or may not be appropriate under the Clayton Act, but clearly does not provide an appropriate test for monopoly power.

The du Pont tests must be applicable to the market actually used, not to one postulated and then subdivided.

B. The Court of Appeals Failed to Apply the Fundamental Rules to Test the Possible Relevant Market.

Nowhere does the Court of Appeals consider whether or not Sunkist might be able to control the price of or eliminate competition in product oranges in the California-Arizona submarket.*

The Court of Appeals applied its relevant market approach mechanically without regard to the economic effects. It recognized that there could be a national market in product oranges; on considerations short of those required to establish a relevant market for §2 of the Sherman Act, it concluded that California and Arizona could constitute a submarket.

This test failed to determine what is really sought here: Could Sunkist control the price or eliminate competition?

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*The only reference in this regard is to the testimony of Morgan Ward regarding Sunkist's setting the price in California. However, as shown in the discussion of the facts before the Court of Appeals, his statement was that Sunkist set the price within the framework of the national market, based on national supply and demand. That testimony is discussed in section II F hereof.

VII.

The Inability of Plaintiff to Buy Product Oranges in Florida and Ship Them to California for Processing Does Not Change the Rules of Liability Under Section 2 of the Sherman Act.

The argument of plaintiff and, indeed, the basis primarily relied upon in the Court of Appeals is not a consideration of the economic power of Sunkist to develop or exploit the sale of product oranges, but quite to the contrary, it is a consideration of the fact that the particular plaintiff here involved cannot economically buy product oranges which are available for sale in Florida and ship them to California for processing. The Court of Appeals further points out that this particular plaintiff is unable to buy oranges from any other growers in California (not due in anyway to Sunkist activity) and has not been able to buy oranges from Sunkist. Because of what is asserted as the practical inability to buy fruit elsewhere, and therefore to compete in the product market, the Court of Appeals reaches the conclusion that a jury might have concluded that California and Arizona constitute a relevant market.

It is apparent that if a relevant market may be established solely on the grounds of convenience of a particular business entity, the basic idea underlying the definition of a monopoly has been changed. Relevant market would then not be defined in terms of the power of a particular business enterprise to exploit a particular market. Of course, any transaction by one competitor limits, in some way, transactions of another. The latter situation in no way implies monopolistic powers.

Plaintiff's argument overlooks the fact that Sunkist had at best only 67% of the product oranges in California and Arizona. Therefore, 33% of the oranges were not subject to Sunkist's control in any way. Why should Sunkist be responsible because these other producers did not sell to plaintiff?

Plaintiff has started from the single fact that it has been unable to buy oranges at prices which it wishes to pay, and from the premise reaches the conclusion that Sunkist is responsible for it, simply because Sunkist has a lafger share of the market than anyone else. However, those other parties are in an equivalent position to Sunkist's, because they also could have supplied plaintiff.

A careful examination of the facts now before the Court shows clearly that plaintiff has not been excluded from competition by Sunkist and that there is no economic significance to the plaintiff's inability to purchase oranges in Florida and ship them to California at prices which would permit competition in the national products market.

A. Plaintiff Has Not Been Excluded From Competing in the Orange Products Market.

Plaintiff desires to purchase product oranges solely for the purpose of manufacturing and selling canned single strength orange juice. The incontestable facts, as accepted by the Court of Appeals, established that that market is a national market. The record also clearly shows that there are a number of ways in which the plaintiff can continue to participate in that competitive market:

(a) So far as Sunkist is concerned, plaintiff can buy any of the product oranges in California and Arizona which do not come into the Sunkist System. If those oranges are not available to plaintiff, it is because of factors entirely outside of Sunkist's control.

(b) The plaintiff can purchase oranges in Florida, process them in Florida, and sell them in the national market.

(c) The plaintiff can buy juice from Florida oranges, ship it to California, and can process it in California for sale in the national market.

(d) The plaintiff could have purchased canned single strength juice, custom packed in Florida, and marketed it under its own label.

(e) The plaintiff can buy juice in California and can it and market it under its own label. (For plaintiff's purposes, such juice is interchangeable with product oranges.)

(f) The plaintiff can directly approach the growers in the Sunkist System, and seek to purchase oranges from them. As the facts show, the growers may terminate their contracts with Sunkist and sell their oranges to plaintiff or anyone else.

(g) The plaintiff can bid on the product oranges which are put up for sale by Sunkist.

It is therefore apparent that plaintiff has not been excluded from participating in the products market as a seller. Plaintiff apparently asserts that it is excluded from the product orange market as a buyer. Such assertion is also not true.

B. Plaintiff Has Not Been Excluded From the Product Orange Market.

There are a number of ways in which plaintiff can obtain product oranges if he wishes to do so.

(a) Sunkist in no way affects the right of plaintiff to acquire the 33% of product oranges in California and Arizona which do not come in to the Sunkist System. If plaintiff does not obtain those oranges, it is because of factors entirely out of the control of Sunkist. Those oranges would be more than adequate to take care of plaintiff's requirements.

(b) Plaintiff can purchase product oranges in Florida. It insists that it does not want to do this, that is its election not to do so.

(c) Plaintiff can seek to acquire oranges from Sunkist growers.

(d) Plaintiff can bid on the product oranges which Sunkist puts up for sale.

(e) Plaintiff can always acquire producing acreage or plant and grow its own oranges if it wishes to have an assured supply.

C. The Effect of Sunkist's Activities Upon Plaintiff Are Not Legally or Economically Significant.

A careful analysis of the limitations which might be placed upon plaintiff's business by Sunkist's activities then may be stated accurately as follows: Plaintiff is limited only in that it cannot be assured of getting approximately 65% of the supply of product oranges in California and Arizona for the purposes of actually processing them in its plant and selling the products which result therefrom. Even this statement is subject to the exception that it may be able to buy some of

those oranges which are put up for sale, if it bids for them.

But even as to the products from these oranges, it can buy chilled juice and still can and market that juice under its own label. In the end result, therefore, it has been limited only in the initial process of squeezing the orange juice from the product oranges to the extent that Sunkist elects to do so with the product oranges it has in its system. That limitation, we submit, is not legally or economically significant. It clearly does not supply the basis for the definition of a relevant market which would establish Sunkist as a monopolist. It clearly does not affect the price at which product oranges or orange products are sold in California and Arizona or elsewhere in the United States. It does not enable Sunkist to make any kind of an unreasonable or exorbitant profit, or in any other way to exploit the market in product oranges or orange products. And it is entirely justifiable because Sunkist, as any other business organization, is entitled to process the fruit within its own organization, and help minimize the overhead on its processing facilities. Not only could an ordinary business corporation do this, but Sunkist has a particular right to do so because its qualification as a Capper-Volstead cooperative expressly permits it to process its own fruit and prepare it for market.

We therefore conclude that Sunkist's activity in determining to process its own fruit, and not offer it for sale to other potential purchasers, is an ordinary business activity which any organization may pursue and that further, it is not a factor which demonstrates or would even justify a jury in finding that the relevant market here is limited to California and Arizona.

Conclusion.

It is therefore respectfully submitted that a writ of certiorari should be granted in this case.

CHARLES E. BEARDSLEY,
SETH M. HUFSTEDLER,
Attorneys for Petitioner
Sunkist Growers, Inc.

DONALD D. STARK,
DALE V. CUNNINGHAM,
Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Case-Swayne Co., Inc., a corporation, Appellant v. Sunkist Growers, Inc., a corporation, Appellee. No. 20070.

United States Court of Appeals Ninth Circuit.

Nov. 21, 1966.

Before Jertberg and Ely, Circuit Judges, and Jameson, District Judge.

Jameson, District Judge:

This is an action seeking treble damages under section 4 of the Clayton Act (15 U.S.C. § 15)[1] for alleged monopoly and attempt to monopolize in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).[2] The district court granted the defendant's motion for a directed verdict at the close of the plaintiff's case.[3]

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[1]15 U.S.C. § 15 provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2]15 U.S.C. § 1 provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

* * * * *

Section 2 provides in part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

[3]At the close of plaintiff's case, the defendant moved for dismissal under Rule 41(b) F.R.Civ.P. or for a directed verdict

(This footnote is continued on the next page)

Plaintiff (appellant), Case-Swayne, Inc., is engaged in the manufacture of single strength juices (canned orange juice and blends of orange juice with other fruit juice) as an independent operator. Defendant (appellee), Sunkist Growers, Inc., is an association of citrus producers.[4] It has as its base 12,000 citrus growers in Southern California and Arizona. The growers are organized into local associations which operate packing houses. The associations in turn are grouped into district exchanges and representatives from the exchanges make up the governing board of Sunkist. The Sunkist organization handles its members' fruit in effect from tree to store.

Appellant contends that the district court erred (1) in granting the defendant's motion for a directed verdict; and (2) in ruling that Sunkist was organized in conformance with section 1 of the Capper-Volstead Act[5] and therefore could not be held in violation of section 1 of the Sherman Act for conspiracy to restrain and monopolize trade in product oranges. If Sunkist

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under Rule 50(a). The court first indicated that it would dismiss pursuant to Rule 41(b), but later concluded that the motion for dismissal was improper and granted defendant's motion for a directed verdict under Rule 50(a).

[4]In addition to Sunkist Growers, Inc., the complaint named Exchange Orange Products Company and Exchange Lemon Products Company as defendants. Subsequently Exchange Orange and Exchange Lemon merged into Sunkist Growers, Inc., which assumed all of the obligations of the merged corporations, and the action was dismissed as to Exchange Orange and Exchange Lemon.

[5]Section 1 of the Capper-Volstead Act (7 U.S.C. § 291) provides that, "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: * * *"

Growers, Inc., was in fact organized as an agricultural cooperative association pursuant to the Capper-Volstead Act, as the district court found, any interorganizational dealings among the various agricultural cooperative associations are immune from the conspiracy provisions of section 1 of the Sherman Act;[6] but Sunkist may still be found liable under section 2 of the Sherman Act for wrongful use of monopoly power and attempt to monopolize.[7] The question presented under the first specification in error is whether the evidence was sufficient for the jury to find that Sunkist wrongfully used monopoly power or attempted to monopolize trade in product oranges.

In ruling on a motion for a directed verdict the trial court is required to view the evidence in the light most favorable to the party against whom the motion is made. "On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion * * * was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify". 5 Moore's Federal Practice 2316 (2d ed. 1951.) This is true "even though contrary inferences might reasonably be drawn". Continental Ore Co. v. Union Carbide, 1962, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed. 2d 777.

Sunkist controlled approximately 70% of all oranges produced in Southern California and Arizona, and approximately 67% of the oranges diverted to product

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[6]See Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 1962, 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305.

[7]See Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 1960, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880; Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra.

use. Product or "excess" oranges are those not sold as fresh fruit. They are used to make various orange products and are the only kind used by plaintiff in its business. On a national basis Sunkist controlled 6 to 7% of the total production.

Other small cooperatives controlled for their own use approximately 18% of the oranges grown in Southern California and Arizona. The balance of the oranges, approximately 12%, represented those grown by independent growers and available to independent manufacturers.

Additional facts set forth in the order granting defendant's motion for directed verdict include the following:[8]

(1) Prior to the development of the citrus juice industry there was no market for fruit not required by the fresh fruit market, and the remainder of the fruit, then called "culls", was destroyed by the packing houses. With the development of the citrus juice industry, the damand for culls, now designated "excess fruit", could be sold to processors to convert into juice and other by-products.

(2) At the beginning of its processing activity plaintiff had no difficulty in obtaining at a reasonable price sufficient fruit for its needs. When it was demonstrated that conversion of excess fruit into juice and other citrus by-products was profitable, Sunkist decided to process its own fruit and for that purpose organized Exchange Orange Products Company and Exchange Lemon Products Company.

(3) Fruit not so processed was sold to independent processors, including plaintiff. Sunkist had excess fruit

[8]All of the facts are substantially in the language of the district court, although they do not appear in the court's order in the same sequence.

available for sale to independent processors only when it was unable to process its own fruit. For several years Sunkist sold its excess fruit to independent processors by a bid system. All independent processors, including plaintiff, were invited to present bids for fruit to be sold.

(4) As time went on and as Exchange Orange and Exchange Lemon developed processing capabilities, more and more excess fruit from Sunkist packing houses was channeled to Exchange Orange and Exchange Lemon until, at the present time, practically no Sunkist fruit is sold to independent processors.

(5) Plaintiff attempted to obtain from other mutual citrus associations its requirement of fruit to process, only to find that such associations had entered into individual contracts with other processors; hence plaintiff was able to obtain very little fruit supply from mutual associations.

(6) Approximately 12,000 citrus fruit growers annually signed contracts with Sunkist agreeing to sell fruit through the Sunkist organization. The contracts provided that if a grower did not abide by his contract, sanctions might be imposed. Occasionally a grower failed to sell his fruit to Sunkist, and sanctions were imposed by the Sunkist organization.

(7) Sunkist trade-mark or trade name was a valuable asset, and defendant had spent large sums in establishing its trade-mark or trade name.

(8) Sunkist employees observed operations of member growers to make certain that the growers handled their crops through the Sunkist organization and if it was discovered that a member grower sold fruit contrary to his contract, a report was made to Sunkist and, in certain instances, penalties were imposed upon the violating grower.

(9) The Department of Agriculture, pursuant to the school lunch program, requested bids for single strength orange juice. One year Sunkist bid but did not receive the contract and another year, Sunkist bid and was awarded the contract.

(10) Sunkist made a large profit from sale of citrus fruit.

(11) The great majority of citrus grown in Southern California and Arizona goes into the fresh fruit market. The greater amount of oranges grown in Florida goes into the citrus products market. Fresh fruit from California, Arizona and Florida compete on the eastern and foreign markets.

(12) It was possible for processors in Florida to make single strength orange juice, can and ship it to California, and sell it at the same price as (or at a price lower than) the Southern California-Arizona produced juice. Florida processors of single strength orange juice could assimilate transportation costs from Florida to California and sell their product in competition with single strength orange juice made within the Southern California-Arizona area. This was possible because of the lower price for which Florida fruit could be purchased.

(13) The price paid for Florida oranges was the dominant factor in determining the price for which single strength orange juice could be sold to the ultimate consumer.

(14) There is also competition between single strength orange juice and orange juice concentrates. Neither of the parties is a producer of concentrated or frozen juice.

The alleged violations of the Sherman Act arise out of "Sunkist's dominant control of oranges grown in Arizona and California together with its vertical integration and dual distribution with respect to oranges designated for product use * * *". More particularly, plaintiff complains that it was unable to purchase oranges for product use from Sunkist at a price that would enable it to compete with canned juice shipped in from Florida.[9]

The district court's granting of the directed verdict was premised upon the conclusion that the "relevant market" was national rather than limited to California-Arizona, and that in light of this plaintiff had not shown evidence of an illegal monopoly.[10]

The cases uniformly hold that "a party has monopoly power if it has, over 'any part of the trade or commerce among the several states', a power of controlling prices or unreasonably restricting competition". United States v. E. I. du Pont de Nemours & Co., 1956, 351 U.S. 377, 389, 76 S.Ct. 994, 1004, 100 L.Ed. 1264. In determining whether a party has monopoly power it is first essential to define the "relevant market".

This court has held that determination of the relevant market, "both as respects products and as concerns geographical area" is a "necessary step precedent to de-

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[9]This is not a complete statement of the alleged monopolistic acts of Sunkist, but it is the act upon which plaintiff places the most emphasis.

[10]The district court initially was of the opinion that the relevant market was Southern California and Arizona, but concluded, when all of the evidence was presented, that the relevant market for product oranges was a national market, "and that whatever happened in Florida directly affected prices in California and vice versa. Prices paid for oranges in California depended substantially upon the price for which oranges were sold in Florida".

termining whether within that market there was a probability" of violation of section 7 of the Clayton Act. Crown Zellerbach Corporation v. F.T.C., 9 Cir., 1961, 296 F.2d 800, 804, (cert. denied (1962)) 370 U.S. 937, 82 S. Ct. 1581, 8 L.Ed.2d 807. While Crown Zellerbach involved a violation of the Clayton Act with respect to corporate acquisitions, it is clear that the same determination must be made regarding the relevant market in actions for violation of section 2 of the Sherman Act. United States v. du Pont & Co., supra.

In the recent case of United States v. Grinnell Corp., 1966, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778, a civil suit for alleged violations of section 2 of the Sherman Act, the Court said in part:

> "* * * That * * * case arose under § 7 of the Clayton Act where the question was whether the effect of a merger 'in any line of commerce' may be 'substantially to lessen competition.' We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." (384 U.S. at 573, 86 S.Ct. at 1705).

In determining the "relevant market" applicable in this case, it seems advisable first to analyze separately the factors involved in both the relevant *product* market and the relevant *geographic* market.

Relevant Product Market

United States v. E. I. du Pont de Nemours & Co., supra, relied upon by the district court in granting Sunkist's motion for a directed verdict, promulgated the test of "reasonable interchangeability" to determine the relevant product market. The Government contended

that cellophane was the relevant product market. The Court assumed that if this were true, du Pont would have monopoly power over that market. The Court found, however, that cellophane was "reasonably interchangeable" with other flexible wrappings, and that the relevant product market accordingly was "flexible packaging materials" rather than cellophane alone.

The rule of "reasonable interchangeability" has been refined and modified in subsequent cases. In particular, the courts have recognized that there may be an outer market and one or more inner submarkets within which competitive effects are to be appraised, i. e. a relevant submarket may constitute the product market for antitrust purposes.

In Brown Shoe Co. v. United States, 1962, 370 U.S. 294, 82 S.Ct. 1502, 8 L. Ed. 2d 510, involving a merger found to be in violation of section 7 of the Clayton Act, the Court said in part:

> "The 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country').
>
> "The Product Market.
>
> "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. (citation) The boundaries of such a submarket may be determined by examining such practical indicia as industry or

public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (370 U.S. at 324-325, 82 S.Ct. at 1523).

The rule of Brown Shoe was expressly applied to cases arising under section 2 of the Sherman Act in the recent case of United States v. Grinnell Corporation, supra, where the Court said:

"In § 2 cases under the Sherman Act, as in § 7 cases under the Clayton Act (Brown Shoe Co. v. United States, 370 U.S. 294, 325, [82 S.Ct. 1502, 8 L.Ed.2d 510]) there may be submarkets that are separate economic entities." (384 U.S. at 573, 86 S.Ct. at 1704).

Relevant Geographic Market

In Brown Shoe, supra, the Court also set forth criteria to be used in determination of the geographic market:

"The Georgraphic Market.

"The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. See S.Rep.No.1775, 81st Cong.2d Sess. 5-6; United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593 [77 S.Ct. 872, 1 L.Ed.2d 1057.] Moreover, just as a product submarket may have § 7 significance as the proper 'line of commerce,' so may a geographic submarket be considered the appropriate 'section of the country.' (Citing cases). Congress prescribed a pragmatic, factual

> approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both 'correspond to the commercial realities' of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other corcumstances it may be as small as a single metropolitan area." 370 U.S. at 336-337, 82 S.Ct. at 1530).

In the recent case of United States v. Pabst Brewing Company, et al., 1966, 384 U.S. 546, 552, 86 S.Ct. 1665, 16 L.Ed. 2d 765, involving the acquisition in 1958 by Pabst Brewing Company of Blatz's Brewing Company, the Court held that the "evidence as to the probable effect of the merger on competition in Wisconsin, in the three-state area (Wisconsin, Illinois and Michigan), and in the entire country was amply sufficient to show a violation of § 7 (of the Clayton Act as amended by the Celler-Kefauver Anti-Merger Amendment)[11] in each and all of these three areas". In 1957, prior to the merger, the two companies had combined sales which accounted for 23.95% of the beer sales in Wisconsin, 11.32% of the sales in the three-state area, and 4.49% of the sales throughout the country.

The Court was unanimous in holding that the district court erred in dismissing the complaint. Mr. Justice Harlan (joined by Mr. Justice Stewart) in a concurring opinion agreed with the district court that viewing the entire continental United States as a relevant market, the evidence did not sustain the Government's conten-

[11]38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18 (1964 ed.).

tion that the acquisition might substantially lessen competition. They agreed with the majority opinion, however, as did Mr. Justice Fortas, that the Government's evidence was sufficient to establish prima facie that Wisconsin and the tri-state area were proper "sections of the country" in which to measure the probable effects of the acquisition.

In his concurring opinion, Mr. Justice Harlan said in pertinent part:

> "The appropriate geographic area in which to examine the effects of an acquisition is an area in which the parties to the merger or acquisition compete, and around which there exist economic barriers that significantly impede the entry of new competitors. * * *" (348 U.S. at 556-557, 86 S.Ct. at 1671).

Whether a geographical location is or is not an "area of effective competition" is a question of fact in each case. United States v. Columbia Pictures Corporation, S.D.N.Y., 1960, 189 F.Supp. 153, 192. The area may be limited by differences in costs of production and transportation. Erie Sand & Gravel Co. v. F. T. C., 3 Cir. 1961, 291 F. 2d 279, 281. "A competive price disadvantage arising from transportation costs is an important factor in determining the scope of a relevant market." United States v. Penn-Olin Chemical Company, D.Dl., 1963, 217 F.Supp. 110, 120; American Crystal Sugar Co. v. Cuban-American Sugar Co., S.D.N.Y., 1957, 152 F.Supp. 387, 398, Aff'd, 2 Cir., 1958, 259 F.2d 524.

It seem clear from the decided cases that (1) while the outer limits of the market may be determined by

the competition of interchangeable products, (2) there may be a well-defined submarket which constitutes the relevant market for antitrust purposes, which (3) must correspond to the commercial realities of the industry, (4) is affected by price disadvantages due to transportation costs, (5) is affected by availability of a buyer to supply and existence of economic areas which significantly impede competition, (6) is determined in part with relation to the parties affected in the suit, and (7) is a question of fact in the particular case.

We come now to an application of the criteria for determining both relevant product market and relevant geographic market to the facts in this case. In advance of trial it was the position of the trial court, as set forth in its pretrial order, that the relevant product market was product oranges and the relevant geographic market Southern California and Arizona. At the close of plaintiff's case, the court was persuaded that the relevant product market included orange juices and concentrates and that the relevant geographic market was national rather than limited to Southern California and Arizona.[12]

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[12]In ruling on defendant's motion for dismissal or a directed verdict, following argument by counsel, the court said:

> "I was of the opinion that Florida was not a part of the market; that it was to be limited to Southern California and Arizona. I was of he opinion and still am of the opinion that it would certainly be uneconomical to try to ship fresh fruit from Florida or from Texas to California for the purpose of being converted into orange juice. So I have to look first to what is the competition in this case, what are the competitive factors?
>
> "Well, if we include Florida as part of the market, then of course Sunkist does not have a dominant place in this picture at all. It is a very minor part of the conversion of fresh fruit into orange juice, if we consider Florida as a part of the market.

It is clear from the evidence that *orange products* (single strength juice and frozen concentrates) were sold in a national market. Oranges could be processed in Florida, and the juice shipped to California and sold competitively with juice processed in California from California oranges. Sunkist held a relatively small part of this national market and controlled neither quantity nor price.

On the other hand, it is equally clear that it was uneconomical for producers of oranges products to buy their *product oranges* in Florida or elsewhere than in the Southern California-Arizona area. Sunkist controlled 70% of all oranges grown in this area and 67% of the product oranges. A substantial portion of the remaining product was unavailable to Case-Swayne.

Appellee does not question these facts, but contends that the relevant geographic market for product oranges was national on the theory that the product

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"Then I thought we were talking about product oranges, the monopoly of product oranges. But it seems to me that we now are talking about product oranges, but also about the juice squeezed from the product oranges. I don't know how you can say that there is a monopoly on product oranges without saying there is a monopoly on the juice that is squeezed from product oranges." (Rep.Tr. 1378:1-20).

"So it seems to me that when we talk about competition, we are going to talk about competition not only of the fruit before it is squeezed, but the product after the squeezing, that is the orange juice.

"Well, if you consider it in that light, then there is lots of competition on the shelves of Southern California, because the testimony is that the Florida producers, the Florida producers of orange juice, that is, those who squeeze the oranges to make orange juice in Florida, can ship it to Los Angeles, pay the shipping charges, and undersell the California product.

"So from these two standpoints, that is talking about competition, what is competition—competition is the competition in the open marketplace." (Rep.Tr. 1379:9-22).

orange supply is tied irrevocably to orange product price. Appellee argues that product oranges "have value only because they can be converted into a product which has value", and that "the value of product oranges cannot exceed that which will permit them to be processed into products and then compete in a national products market dominated by Florida".

While product oranges may have little, if any, value per se, the same is true of many raw products. The market for raw products is among the processors rather than the ultimate consumer. We see no reason why the raw product may not be the relevant product market, even though it has little value in its raw state. Moreover, it is clear from the recent case of United States v. Pabst Brewing Company, supra, that even as to the processed product, the relevant market may at the same time be national, regional, and statewide in area.[13]

While Sunkist could not control the supply or price of canned juices because of competition from Florida in these products, there was substantial evidence that it did control the supply product oranges from which juice was made in California and Arizona. In determining the relevant geographic market, a proper test is the "'* * * geographic structure of supplier-customer relations.'" United States v. Philadelphia National Bank, et al., 1963, 374 U.S. 321, 357, 83 S.Ct. 1715, 1739, 10 L. Ed. 2d 915. The relevant market is de-

[13]We concluded in Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 9 Cir. 1960, 284 F.2d 1, that the relevant market area for oranges and by-products, including fruits and juices, was the California-Arizona area, although it does not appear that the parties in that case argued or the court considered the distinction between product oranges and orange products or any contention that the market was national.

termined in part by the market area "to which the purchaser can practicably turn for supplies". Tampa Electric Co. v. National Coal Co., 1961, 365 U.S. 320, 327, 81 S.Ct. 623, 628, 5 L.Ed.2d 580.[14] There is no question that Case-Swayne and other users of product oranges could not as a practical matter obtain product oranges from supplies outside California and Arizona.

Moreover, even though the price of product oranges in Florida would influence the price of product oranges in California, there was evidence from which the jury might find that Sunkist by reason of its control of the supply also as a practical matter controlled the price.[15] That is particularly true if it should be found that Sunkist refused to sell to plaintiff and other independent buyers at any price.

As Mr. Justice Fortas said in his dissenting opinion[16] in the recent case of United States v. Grinnell Corporation, supra, "The central issue is where does a potential buyer look for potential suppliers of the

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[14]See also Standard Oil Co. of Cal. and Standard Stations v. United States, 1945, 337 U.S. 293, 299, note 5, 69 S.Ct. 1051, 93 L.Ed. 1371.

[15]Morgan Ward, who handled the oranges of most of the independent growers, testified in pertinent part:

"Q Is it your opinion, then, that the market conditions with respect to Florida product oranges have more effect on the price of product oranges in California than any one factor?

"A They have effect on the over-all United States. Then those who set prices on the fruit in California look at what is going on all over the United States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. But the price of by-products in this state has ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time." (Rep.Tr. 392:1-14).

[16]Justices Fortas, Stewart and Harlan would have remanded for a "new determination" of the basic issue of "the definition of the relevant market".

service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency." (384 U.S. at 589, 86 S.Ct. at 1713, 16 L.Ed.2d 778).

We conclude that there was evidence from which the jury might properly find that the relevant product market was product oranges and the relevant geographic market Southern California-Arizona.

Evidence of Wrongful Use of Monopoly Power and Attempt to Monopolize

If the jury should find that Southern California and Arizona was the relevant market, there was sufficient evidence from which the jury could find further that Sunkist engaged in monopolistic practices or an attempt to monopolize proscribed by section 2 of the Sherman Act.

As the Court said in United States v. Grinnell Corp., supra:

> "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

* * * * * *

> "In United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 [76 S.Ct. 994, 1005, 100 L.Ed. 1264,] we defined monopoly power as 'the power to control prices or exclude competition.' The existence of such power ordinarily may be inferred from the predominant share of the market. In American Tobacco Co. v. United states, 328 U.S. 781, 797, [66 S.Ct. 1125, 1133, 90 L.Ed. 1575,] we said that 'over two-thirds of the entire domestic field of cigarettes and * * *; over 80 per cent of the field of comparable cigarettes' constituted 'a substantial monopoly.'" (384 U.S. at 570-571, 86 S.Ct. at 1704).

It is clear that Sunkist had possession of monopoly power in the relevant market, if that market is found to be the Southern California-Arizona area.

It is true, as appellee contends, that size alone does not constitute an offense under the Sherman Act; nor does the mere possession of monopoly power. It is the wrongful use and exercise of that power which is proscribed by section 2 of the Act.

However, the ultimate consideration in determining whether an alleged monopolist violates section 2 of the Sherman Act is "whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing." United States v. E. I. du Pont de Nemours & Co., supra, 351 U.S. at 380, 76 S.Ct. at 999, 100 L.Ed. 1264. It is not always necessary to find a specific intent to find that an antitrust law has been violated. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or

business arrangements (citing cases). To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 2 Cir., 148 F.2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." United States v. Griffith, 1948, 334 U.S. 100, 105, 68 S.Ct. 941, 944, 92 L.Ed. 1236.

Appellant contends that Sunkist wrongfully exercised its monopoly power through (1) boycotting appellant by refusing to sell appellant product oranges while selling to other processors; (2) preventing TreeSweet from delivering oranges TreeSweet had committed to appellant; (3) controlling orange prices; and (4) eliminating competitors (or as with appellant, limiting their profits) by maintaining high prices for oranges or reducing supply.

The same acts are relied upon in support of appellant's contention that Sunkist intentionally attempted to monopolize the trade in product oranges in the relevant market. Appellant relies upon additional evidence of such intent in Sunkist's (1) admitted purpose to control all the oranges it could get and utilize all of them in its own manufacturing facilities; (2) preventing Placentia Orange Distributors from fulfilling its promise to sell appellant 5,000 tons of oranges in 1957; (3) policing the Sunkist system to punish violators of the Sunkist "restrictive tying contracts"; (4) wrongful use of dual distribution by lowering single strength juice prices after competing manufacturers had purchased product oranges at prices established by Sunkist; (5) use of consignment contracts and its low 1956 bid (compared with its 1955 bid) to the Department of Agriculture.

Appellee recognizes in its brief that "the key determination by the trial court was that the appellant's evidence * * established the fact that the relevant market for product oranges is a national market", but contends further that "under each of the tests which the courts have applied to determine whether or not a monopoly exists, the appellant's evidence conclusively established that there was no monopoly", and that with respect to each of the acts and incidents upon which appellant relies, Sunkist's conduct was "legitimate, cooperative activity and not undertaken in an unlawful manner or for an unlawful purpose". There is substantial evidence to support appellee's denial of each of the alleged acts of monopoly.

In determining the issues of monopolization and intent to monopolize, however, the evidence must be viewed as a whole. Even though the proof as to each of the specific acts may be insufficient in itself to establish wrongful use of monopoly power, the jury must look at the "whole picture", weigh the contradictory evidence and inferences and draw the "ultimate conclusion as to the facts". See Continental Ore Co. v. Union Carbide and Carbon Corp., supra, 370 U.S. at 699-701, 82 S.Ct. at 1411, 8 L.Ed.2d 777, and cases there cited.

As noted supra, in ruling on the directed verdict this court must give appellant "the advantage of every fair and reasonable intendment that the evidence can justify", and this is true "even though contrary inferences might reasonably be drawn". From a review of the record we conclude that there was sufficient evidence to submit to the jury the question of whether Sunkist wrongfully exercised its monopoly power and inten-

tionally attempted to monopolize the trade in product oranges. We do not find that appellant has established any of the alleged acts of monopoly—only that viewing the evidence as a whole, it has made a prima facie case for the jury.[17]

Section 1 of the Capper-Volstead Act

Appellant contends that Sunkist is not a person "engaged in the production of agricultural products" under Section 1 of the Capper-Volstead Act because only 80.12% of its members are associations composed of fruit growers, while 4.97% are corporate growers, and 14.91% are private profit-making corporations, individuals and partnerships which market through Sunkist the oranges they have purchased from growers.[18]

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[17]In Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., supra, the plaintiff relied upon some of the acts of monopoly here alleged. We upheld the submission of the case to the jury and the instructions given by the trial Court. The Supreme Court granted certiorari limited to the issue of the immunity of interorganizational dealings among the three cooperatives from the conspiracy provisions of the antitrust law, and held that as a Capper-Volstead cooperative Sunkist was immune and that the case was erroneously submitted to the jury on the theory of a conspiracy under section 1 of the Act. Having held "erroneous one theory of liability upon which the general verdict may have rested * * * it is unnecessary * * * to explore the legality of the other theories". The Court said further that its decision "in no way detracts from earlier cases holding argicultural cooperatives liable for * * * monopolization", citing Maryland & Virginia Milk Producers Ass'n. v. United States, supra. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. at 20-30, 82 S.Ct. at 1136, 8 L.Ed.2d 305.

[18]A stipulation of the parties defining "association" in the Sunkist system recites that the members are classified into three major groups: (1) cooperative associations (80.12% by number and 82.34% by volume), (2) corporate growers (4.97% by number and 4.72% by volume), and (3) agency associations (14.91% by number and 12.94% by volume). The stipulation reads in part: "The Agency Association is normally a private corporation which owns and operates packing house facilities * * *. Such

The district court concluded, and we think correctly, that under the decision of the Supreme Court in Sunkist Growers, Inc. v. Winckler & Smith Co., supra, Sunkist Growers, Inc. is a cooperative organized in compliance with Section 1 of the Capper-Volstead Act. It is true, as appellant argues, that this issue was not specifically raised in the Winckler case, but the Court did describe the Sunkist organization in detail. This was prior to the merger with Exchange Orange and Exchange Lemon, but the Court concluded that the 12,000 growers were "in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though * * formally organized * * * into three separate legal entities". (370 U.S. at 29, 82 S.Ct. at 1136). The Court also said in pertinent part:

> "The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. And the legislative history of the Acts reveals several references to the Sunkist organization—then called the California Fruit Growers Exchange and numbering 11,000 members—including a suggestion by Senator Capper that this was a type of cooperative that would find 'definite legalization' under the legislation. * * *
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> "* * * That the packing is done by local associations, the advertising sales, and traffic by divisions of the area association, and the processing by

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Agency Associations do not qualify as, nor do they claim to be, cooperative associations under section 1 of the Capper-Volstead Act. * * * The Agency Association does not itself participate in either the gain or loss involved in marketing fruit through Sunkist beyond the recovery of its costs and fixed fee for packing. Such Agency Association furnishes its facilities and services on an independent contract basis, wholly unrelated to the net returns from the sale of the product handled". (Clk.Tr. 1792-4).

separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts." (370 U.S. at 28-29, 82 S.Ct. at 1136).

With respect to appellant's contention that Sunkist is not a qualified cooperative under Capper-Volstead by reason of its "corporate growers", this question was raised in the district court in United States v. Maryland & Virginia Milk Producers Ass'n, D.D.C. 1958, 167 F.Supp. 45, aff'd in part, reversed in part on other grounds, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880. In that case the Government urged that the words "dairymen" and "farmers" should be restricted to natural persons. The district court held that it was immaterial "whether every member of the association is a natural person or a corporation."[19]

The Supreme Court did not comment on this portion of the district court's opinion, although it considered at length the scope of the immunity granted by Capper-Volstead. It is clear from the district court's opinion that the cooperative included corporate growers. It seems likely that this fact would have been considered by the Supreme Court if there were any question regarding the status of the association as a qualified cooperative by reason of the corporate growers.

1 U.S.C. § 1 provides that in "determining the meaning of any Act * * * of Congress, unless the context

[19]The court said further:

"* * * The owner or operator of a dairy is a dairyman, whether he personally works on his dairy or has the work done by employees. So, too, the owner of a farm may be regarded as a farmer even though he devotes the major portion of his activities to other pursuits. * * *." (167 F.Supp. at 49).

indicates otherwise * * * the words 'person' and 'whoever' includes corporations * * * as well as individuals * * *".

We find nothing in the context of the Capper-Volstead Act to indicate that a corporation would not be considered a person within the meaning of the Act.

Does the fact that the so-called agency associations (comprising 14.91% by number and 12.94% by volume) constitute a "class" of membership prevent Sunkist from being a "person engaged in the production of agricultural products" under section 1 of the Act? It will be noted from the stipulation of the parties (note 18) that the agency associations furnish their facilities and services on an independent contract basis, and that they do not participate in either gain or loss involved in marketing fruit through Sunkist. In other words, the growers receive full benefit of cooperative marketing through the agencies.

Associations organized under the Capper-Volstead Act "may make the necessary contracts and agreements to effect" the purposes of the Act, i.e., "collectively processing, preparing for market, handling, and marketing" their products. (7 U.S.C. § 291). The agency associations supply services which the growers require (packing house facilities) in handling and marketing their products. The fact that the "packing is done by local associations * * * and the processing by separate organizations" does not preclude the growers from being considered one association for purposes of the Capper-Volstead Act. Sunkist Growers, Inc v. Winckler & Smith Co. supra.

This is not a case where the agreement in question goes beyond the legitimate objects of processing and

marketing. See e. g. United States v. Borden Co., 1939, 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed. 181. The Court there recognized that agricultural producers "may unite in preparing for market and in marketing their products", and may "make the contracts which are necessary for that collaboration", but they are not authorized to conspire with others in restraint of trade. The Court said in part:

> "In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officals and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois * * * and also to control 'the supply of fluid milk permitted to be brought to Chicago'." (308 U.S. at 205, 60 S.Ct. at 191).

In Maryland & Virginia Milk Producers Association v. United States, supra, the court pointed out that the object of the conspiracy or combination was to eliminate a competitor and that the "allegations of the complaint * * * charge *anticompetitive activities which are so far outside the 'legitimate objects' of a cooperative* that, if proved, they would constitute clear violations of § 2 of the Sherman Act * * *." (362 U.S. at 468, 80 S.Ct. at 854, 4 L.Ed.2d 880). (Emphasis added). The Court said further:

> "The Embassy assets the Association acquired are useful in processing and marketing milk, and we may assume, as it is contended, that *their purchase simply for business use, without more, often*

> *would be permitted and would be lawful under the Capper-Volstead Act.* * * * The contract of purchase here, viewed in the context of all the evidence and findings, *was not one made merely to advance the Association's own permissible processing and marketing business;* it was entered into by both parties, according to the court's findings as we understand them, because of its usefulness as a weapon to restrain and suppress competitors and competition * * *." (362 U.S. at 471-472, 80 S.Ct. at 856). (Emphasis added).

The independent contracts with the agency associations were for the legitimate objects of processing and marketing. Under the statute Sunkist could have entered into these contracts "with separate organizations". The mere fact that the agency associations constitute a "class" of membership does not in our opinion change the effect of the agency agreements or destroy the exempt status of the entire association.

Request for Leave to File Second Supplemental Complaint

Appellant next contends that the district court abused its discretion in denying plaintiff's motion to file a second supplemental complaint alleging facts occurring after the filing of the original complaint. In our opinion, upon remand of this case, appellant should be permitted to file the supplemental complaint. As the Court said in Texarkana v. Arkansas, Louisiana Gas Co., 1939, 306 U.S. 188, 59 S.Ct. 448, 83 L.Ed. 598:

> "Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justifies other

or further relief is proper. If the original decree in the trial court had not been entered, this supplemental petition would simplify the controversy. We think this procedure is equally applicable after remand for further proceedings." (306 U.S. at 203, 59 S.Ct. at 455).

Alleged Prejudice and Bias of Trial Judge

Finally appellant contends that the trial judge showed such marked prejudice against appellant that this court should order a new trial before another judge. In our opinion, the record does not support our issuance of the requested order. We are confident that the district court, upon remand and in the proper administration of its own functions, will insure that the retrial is conducted in the necessary atmosphere of total impartiality.

It is ordered that the judgment be reversed and the cause remanded to the district court for a new trial.

Ely, Circuit Judge (dissenting in part):

I agree with the result reached by the majority, and I concur in its opinion except for that portion in which it is held that Sunkist falls within the exemption of section 1 of the Capper-Volstead Act, 7 U.S.C. § 291.

The principal reason offered by the majority in support of the view which I question is its asserted belief that the question was settled in Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962). I do not so interpret that decision. The particular issue was not presented to the Supreme Court, and it was not adjudicated. It was apparently conceded by the parties in *Winckler,* of which the appellant here was not one,

that Sunkist was covered by the Capper-Volstead exemption. In the prior opinion of the Court of Appeals, reported at 284 F.2d 1 (9th Cir. 1960), the only discussion of the exemption pertained to its extent, not to whether or not it was applicable. Furthermore, the Supreme Court, in granting certiorari, 368 U.S. 813, 82 S.Ct. 56, 7 L.Ed.2d 22 (1961), expressly limited its consideration to a single question, namely,

> "Where a group of citrus fruit *growers* form a co-operative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three co-operative agricultural associations, each of which is basically *wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act* (7 U.S.C.A., sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act [15 U.S.C.A. §§ 1, 2] upon proof only that these *growers,* through the agency of these three co-operatives, *agreed among only themselves* with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?" (Emphasis supplied.)

Even if the issue had been determined by the Supreme Court in *Winckler,* the admitted nature of Sunkist's present organizational make-up is such that the exemption should no longer be held properly to apply. The privilege to act together in "exempt" associations

is conferred only upon "persons engaged in the production of agricultural products. * * *." 7 U.S.C. § 291. The plain import of the statutory language is that such an association must be composed *solely* of agricultural producers. Regardless of whether Sunkist was thus composed at the time of the *Winckler* decision in 1962, as the Supreme Court's order granting certiorari, supra, indicates, it is clear that the composition is no longer the same. In our case, it is conceded that the so-called "agency associations," which comprise almost 15% of the membership of the Sunkist organization, are *not* growers or producers.[1] The majority, in disregarding the significance of this factor, may have been influenced by the absence of decisions squarely holding that an association must be composed entirely of growers in order to qualify for the exemption. I point out that, while there are no decisions to that effect, there are none to the contrary. The opinions in a number of cases contain language which suggests the conclusion which I see to be plainly required by the statute's terms. Some of this language is as follows:

> "The persons to whom the Capper-Volstead Act applies are defined in § 1 as *producers of agricultural products* * * *. *They* are authorized to act together 'in collectively processing, preparing for

[1] In its footnote 18, the majority refers to a portion of a stipulation wherein the parties agreed that the agency associations furnished to Sunkist their "facilities and services on an independent contract basis * * *." The stipulation does *not* say that the associations were independent contractors. It recites that they were "*members*" of the Sunkist system. If the association were truly separate and independent, then that determination should be made, in the first instance, by the District Court. If they were not "members" of the Sunkist system, then, as I see it, the exemption of the Capper-Volstead Act is irrelevant to the issue of the propriety of Sunkist's dealings with them. United States v. Borden Co., supra.

market, handling, and marketing in interstate and foreign commerce' their products. * * *

"The right of *these agricultural producers* thus to unite * * * cannot be deemed to authorize any combination or conspiracy *with other persons* in restraint of trade that these producers may see fit to devise." United States v. Borden Co., 308 U.S. 188, 204-205, 60 S.Ct. 182, 84 L.Ed. 181, 191 (1939) (Emphasis supplied.).

"The chief defense set up by the Association was that, because of its being a cooperative composed *exclusively of dairy farmers,* § 6 of the Clayton Act and §§ 1 and 2 of the Capper-Volstead Act completely exempted and immunized it * * *. Accordingly the court dismissed the Sherman Act § 2 monopolization charge, where the Association was not alleged to have acted in combination with others, but upheld the right of the Government to go to trial on the Sherman Act § 3 and Clayton Act § 7 charges *because they involved alleged activities with* the owners of Embassy and other *persons who were not agricultural producers."* Maryland & Virginia Milk Producers Assn., Inc. v. United States, 362 U.S. 458, 461-462, 80 S.Ct. 847, 851, 4 L.Ed.2d 880 (1960) (Emphasis supplied.).

"Thus, the full effect of § 6 is that a *group of farmers* acting together * * * cannot be restrained * * *.

"The Capper-Volstead Act * * * extended § 6 of the Clayton Act exemption to capital stock agricultural cooperatives * * *. The general philoso-

phy of both was simply that *individual farmers* should be given * * * the same unified competitive advantage * * * available to businessmen * * *." Id., 362 U.S. at 465-466, 80 S.Ct. at 853 (Emphasis supplied.).

"[O]ur decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups, United States v. Borden Co., 308 U.S. 188, [60 S.Ct. 182, 84 L.Ed. 181] * * *." Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 30, 82 S.Ct. 1130, 1136, 8 L.Ed.2d 305 (1962).

"The Court concludes that a combination between two or more agricultural cooperatives to fix prices of their products is exempt from the anti-trust laws *provided that no other person that is not such an organization or a member of such a group is a part of the combination.*" United States v. Maryland Cooperative Milk Pro., 145 F.Supp. 151, 155 (D.D.C. 1956) (Emphasis supplied.).

"Although the Capper-Volstead Act * * * and the Clayton Act * * * give *some privileges to combinations* of agricultural *producers, a combination of producers and distributors* to eliminate competition and fix prices at successive stages in the marketing of an agricultural product *is not privileged.*" United States v. Maryland & Virginia Milk Pro. Ass'n, 85 U.S.App. D.C. 180, 179 F.2d 426, 428 (1949) (Emphasis supplied.).

"The exemptions are accorded and immunities are conferred on agricultural cooperatives and their activities. *When they* step outside of their field and

> *conspire with persons who are not producers of agricultural commodities,* they are *beyond the scope of the exemptions.*" United States v. Maryland & Virginia Milk Pro. Ass'n, 167 F.Supp. 45, 51-52 (D.D.C.1958), modified, 362 U.S. 458, 80 S.Ct. 847, 4 L.Ed.2d 880 (1960) (Emphasis supplied.).

The persistent theme of the foregoing excerpts is that a cooperative, even though it otherwise qualifies for exemption under the Capper-Volstead Act, forfeits its exemption when it combines with non-producers. If that is so, then it is logically inconsistent to hold that a cooperative, while composed in part of non-producers, may yet qualify for the exemption.

APPENDIX B.

Memorandum and Order Granting Motion for Directed Verdict.

United States District Court, Southern District of California, Central Division.

Case Swayne Co., Inc., Plaintiff, vs. Sunkist Growers, Inc., Defendant. No. 333-58-HW.

Two motions are now pending for determination in the above-entitled action:

1. Motion for Directed Verdict, filed on behalf of defendant.

2. Motion for Mistrial, filed on behalf of plaintiff.

For the reasons hereinafter stated this Court is of the opinion the Motion for Mistrial should be denied and the Motion for Directed Verdict granted.

Defendant Sunkist Gowers, Inc. (hereinafter designated as Sunkist) is a mutual association of citrus growers. It is a qualified Capper-Volstead cooperative. Approximately 12,000 citrus growers in Southern California and Arizona comprise the organization. Each member of the cooperative is a member of a Sunkist Packing House.

At the time of harvesting the citrus crop the packing house sends a crew into the grower's grove to pick the fruit and transport it to the packing house. There the fruit is washed, cleaned, and segregated. Most citrus fruit grown in the Southern California-Arizona area is forwarded to the fresh fruit market not only in Southern California and Arizona but also in all other states of the Union and in foreign countries.

Years ago there was no market for fruit not required by the fresh fruit market, and as a consequence the remainder of the fruit (at that time termed "culls") was destroyed by the packing houses. But with the development of the citrus juice industry demand arose for fruit not consumed by the fresh fruit markets, with the result that culls (now designated as "excess fruit") could be sold to processors to convert into juice or other by-products.

Plaintiff is a corporation which for many years has been processing excess oranges, making from them single strength orange juice or other by-products. Single strength orange juice is the natural juice obtained from the fruit. It is neither diluted nor concentrated in any manner. It is sealed in cans by the processor and sold on the market without refrigeration.

In the beginning of its processing activity plaintiff had no difficulty in obtaining at a reasonable price sufficient fruit for its needs. But when it was demonstrated that conversion of excess fruit into juice and other citrus by-products was profitable. Sunkist decided to process its own fruit and for that purpose organized Exchange Orange Products Company and Exchange Lemon Products Company.

Exchange Orange Products Company was organized to process the excess oranges of the various Sunkist Packing Houses. Exchange Lemon Products Company was organized to process lemons and grapefruit grown by Sunkist members. As time went on and as Exchange Orange and Exchange Lemon developed processing capabilities, more and more excess fruit from Sunkist packing houses was channeled to Exchange Orange and Exchange Lemon until, at the present time, prac-

tically no excess Sunkist fruit is sold to independent processors.

Plaintiff attempted to obtain from other mutual citrus associations its requirement of fruit to process, only to find that such associations had entered into individual contracts with other processors; hence plaintiff was able to obtain very little fruit supply from mutual associations.

Because of plaintiff's inability to acquire excess fruit for its processing plant, in April, 1958, it filed the above-entitled action against Sunkist, The Exchange Orange Products Company and The Exchange Lemon Products Company, on the theory that the three defendants had combined and entered into contracts, and had conspired, to restrain trade and commerce among the several states in by-product citrus products of the Southern California-Arizona area, and that the defendants had monopolized or attempted to monopolize by-product citrus fruits in the Southern California-Arizona area.

Winckler & Smith Citrus Products Co. had filed a similar action in the District Court for the Southern District of California, Southern Division (San Diego), naming the same defendants. The Winckler case was tried to a jury, and the jury found that a conspiracy did exist between Sunkist and Exchange Orange and Exchange Lemon; and the jury assessed a very substantial verdict against them.

On appeal to the United States Court of Appeals for the Ninth Circuit (281 F.2d 1, decided September 30, 1960) the verdict was affirmed on the issue of liability. Upon certiorari to the Supreme Court of the

United States (*Sunkist v. Winckler & Smith Co.*, 370 U.S. 19), that Court reversed, stating at page 27:

> "We are squarely presented then, with the question of whether Sunkist, Exchange Orange, and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. We conclude not. Section 6 of the Clayton Act provides, inter alia, that agricultural organizations instituted for the purposes of mutual help shall not be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. * * *.
>
> "* * * *.
>
> "* * *, we feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities. * * *."

Subsequent to the above-quoted decision of May 28, 1962, plaintiff in the action at bar filed herein an amended or supplemental complaint, in which the theory of conspiracy was abandoned but monopoly and attempted monopoly were realleged. At the trial of the within action before a jury the following facts were established:

1. That Sunkist Growers, Inc. controlled approximately 70% of the citrus fruit grown within the Southern California-Arizona area.

That approximately 12,000 citrus fruit growers annually signed one-year contracts with Sunkist,

agreeing to sell fruit through the Sunkist organization.

That each year the contracts were renewed by any grower who wished to renew; and each and every grower had the right to withdraw from the Sunkist organization if he so desired.

That the one-year contract provided that if, during the term of the contract, a grower did not abide by his contract and handle fruit through Sunkist, sanctions might be imposed upon the grower so breaching the contract.

That occasionally a grower failed to sell his fruit through Sunkist during his contract term but sold the fruit to others, and sanctions were imposed upon the breaching grower by the Sunkist organization.

2. That upon the establishment of Exchange Orange and Exchange Lemon, Sunkist commenced to process its excess fruit. Fruit not so processed was sold to independent processors, such as the plaintiff in this action.

That Sunkist had excess fruit available for sale to independent processors only when it was unable to process its own fruit.

That for several years Sunkist sold its excess fruit to independent processors by a bid system. That all independent processors, including plaintiff, were invited to present bids for fruit to be sold.

3. That the Sunkist trade mark or trade name was a valuable asset, and defendant had spent large sums in establishing its trade mark or trade name. That the trade mark or trade name could

be used by those growers selling fruit to Sunkist packing houses, but that if a Sunkist member grower withdrew from the organization or failed to abide by the contract terms, he was no longer permitted to use the trade name or trade mark "Sunkist."

4. That Sunkist employees observed operations of member growers to make certain that such growers handled their crops through only the Sunkist organization, and if and when discovery was made that a member grower sold fruit contrary to his contract with Sunkist, a report was made to Sunkist and, in certain instances, penalties were imposed upon the violating grower.

5. That the Department of Agriculture, pursuant to the school lunch program, requested bids for single strength orange juice; that one year Sunkist bid but did not receive the contract and, in another year, Sunkist bid and was awarded the contract.

6, That Sunkist made a large profit from sale of citrus fruit.

Although (to establish its claim of monopoly or attempted monopoly) plaintiff alleges that Sunkist practiced certain "predatory acts", not any of the acts complained of by plaintiff was in itself illegal.

It is plaintiff's contention that inasmuch as Sunkist controlled approximately 70% of all citrus groves in the Southern California-Arizona area, that in itself created monopoly. Size alone is not sufficient to establish monopoly; and any grower within the Southern California-Arizona area was free to join the Sunkist organization if he so desired.

There is no evidence before the Court to indicate that any grower was forced to join the Sunkist cooperative against his will. Joining Sunkist was an entirely voluntary act by the individual grower and, so far as the evidence disclosed, a grower joined the Sunkist organization solely because he felt he could obtain a better return from his crop than by selling it individually or by becoming a member of any other cooperative.

Plaintiff complains that Sunkist sold most of its crop to the fresh fruit market; consequently, more fruit channeled to the fresh fruit market meant less fruit available for processing.

The Sunkist organization belonged to the growers. It was the duty of Sunkist to sell the crops at the highest price it could obtain for its member growers.

Plaintiff complains that after Exchange Orange and Exchange Lemon were established Sunkist could not process all of its excess fruit through these two organizations and entered into contracts with third parties for the processing of excess fruit. This practice, plaintiff alleges, is an indication that defendant was attempting to obtain a monopoly.

But what Sunkist could do itself it could also accomplish through an agent, and there is nothing to indicate anything unusual or illegal in the arrangements Sunkist made with other processors to handle Sunkist's excess fruit.

Plaintiff complains of the so-called espionage system allegedly maintained by Sunkist, contending that by this "espionage" plaintiff was precluded from purchasing oranges from Sunkist growers.

If the contracts entered into each year by Sunkist with the individual growers were legal (and there is nothing in the record to indicate they were illegal), then Sunkist had the right to insist upon compliance with the contract terms; and so far as is apparent to this Court there is nothing illegal in a contracting party's insistance upon performance of a contract in accordance with its terms. And, if the contract provided for sanctions in the event of breach, there was nothing illegal in Sunkist's assertion of the sanctions upon a defaulting grower.

Plaintiff contends the bid-system sale of excess fruit by Sunkist indicated an attempt to establish a monopoly; that because of such bid system Sunkist was able to obtain higher prices for the fruit sold. No evidence was adduced at the trial to indicate the bid system was unlawful or had been unlawfully pursued. All processors were treated alike—bids were solicited from all processors; but plaintiff refused to bid.

Plaintiff has premised its amended or supplemental complaint upon the theory of monopoly or attempted monopoly. The best definition we find of monopoly is "lack of competition." Plantiff would limit the area of alleged monopoly or attempted monopoly (or lack of competition) to the Southern California-Arizona area; but to ascertain whether a monopoly or attempted monopoly did in fact exist, as contended by plaintiff, consideration must be given to the citrus market as a whole. Plaintiff would ignore national and foreign markets in its attempt to establish monopoly by Sunkist.

Evidence at the trial indicated the great majority of citrus grown in Southern California and Arizona goes into the fresh fruit markets. It was established that

in Florida, however, the greater amount of oranges grown there went to the citrus products market. Evidence also disclosed that fresh fruit from California, Arizona, and Florida competed on the eastern and foreign markets.

Plaintiff charges defendants with monopoly of excess citrus fruit. If the area of competition could be limited to the Southern California-Arizona area only, there is no question that Sunkist dominated approximately 70% of the citrus produced in that geographic area. But evidence in the case established that the quantity of fruit produced in Florida had a direct bearing on prices of citrus produced in California and that, in fact, the major factor affecting prices of oranges in California was the orange harvest in Florida.

Although plaintiff would limit the market to Southern California-Arizona, evidence established there was one, national, citrus market, and that whatever happened in Florida directly affected prices in California and vice versa. Prices paid for oranges in California depended substantially upon the price for which oranges were sold in Florida.

The evidence indicated it was possible for processors in Florida to make single strength orange juice, can it, ship it to California, and sell it at the same price as (or at a price lower than) the Southern California-Arizona produced juice. The testimony was that Florida processors of single strength orange juice could assimilate transportation costs from Florida to California and sell their product in competition with single strength orange juice made within the Southern California-Arizona area. This was possible because of the lower price for which Florida fruit could be purchased.

The Court must conclude there was competition in the orange juice industry between the Southern-California-Arizona area and Florida. Evidence indicated the price paid for Florida oranges was the dominant factor in determining the price for which single strength orange juice could be sold to the ultimate consumer.

It further appears that there is also competition between single strength orange juice and orange juice concentrates. Neither of the parties in the action at bar were producers of concentrated or frozen juices. However, frozen juice is in direct competition with single strength orange juice.

The Court believes this case at bar to be similar to *United States v. du Pont & Co.*, 351 U.S. 377, in which the Supreme Court of the United States considered the question of competition of cellophane. The Government had filed an action against du Pont, alleging monopoly. The Court said, at page 399:

> "But, despite cellophane's advantages, it has to meet competition from other materials in every one of its uses. * * *. Thus, cellophane shares the packaging market with others."

And at page 404:

> "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. The market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. While the application of the tests remains uncertain, it seems to us that du Pont should not be found to

monopolize cellophane when that product has the competition and interchangeability with other wrappings that this record shows."

This Court is consequently of the opinion that processors of single strength orange juice in Southern California-Arizona had to meet competition of Florida single strength orange juice as well as the competition of juice concentrates.

At the conclusion of plaintiff's presentation of its case, defendant moved for dismissal under Rule 41 (b) of the Federal Rules of Civil Procedure or for a directed verdict under Rule 50 (a). But before entry of judgment counsel for defendant called to the Court's attention the amendment to Rule 41 (b), which amendment makes the rule applicable solely to cases tried without a jury; that the motion for dismissal under Rule 41 (b) was, therefore, in error, and defendant's motion for directed verdict under Rule 50 (a) was renewed.

As no judgment has yet been entered in this action, the Court is of the opinion the Motion for Directed Verdict now pending must be granted.

Rule 50 (a) of the Federal Rules of Civil Procedure provides:

"* * *. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

Judgment will be entered accordingly.

Dated this 1st day of March, 1965

/s/ Harry C. Westover

United States District Judge

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No. 1340

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

SUNKIST GROWERS, INC., *Petitioner,*

v.

CASE-SWAYNE CO., INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CASE-SWAYNE CO., INC. IN OPPOSITION

WILLIAM H. HENDERSON,
8510 16th St., No. 718,
Silver Spring, Maryland 20910.

W. GLENN HARMON,
703 Market Street, Suite 1400,
San Francisco, California 94103.
Attorneys for Respondent.

J. EDWARD JOHNSON,
703 Market Street, Suite 1400,
San Francisco, California 94103.

RICHARD A. PERKINS,
202 So. Hamilton Drive, No. 700,
Beverly Hills, California 90211.
Of Counsel.

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BRIEF OF CASE-SWAYNE CO., INC. IN OPPOSITION

Case-Swayne Co., Inc., respondent (hereinafter referred to as Case-Swayne) opposes the petition for writ of certiorari of Sunkist Growers, Inc. (hereinafter referred to as Sunkist).

Opinions Below

The opinions of the Court of Appeals are reported at 369 F. 2d 449. The District Court's memorandum and order granting motion for directed verdict is unreported.

Jurisdiction

The decision of the Court of Appeals was entered on November 21, 1966. Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit provides

that a petition for rehearing may be presented within 30 days after judgment. On December 16, 1966, respondent filed petition for rehearing to review so much of the decision of the United States Court of Appeals as held that Sunkist was a cooperative organized in compliance with section 1 of the Capper-Volstead Act. On December 22, 1966, Sunkist filed a petition for rehearing. Sunkist's petition for rehearing was not timely being filed one day beyond the thirty-day period permitted by Rule 23 of the Court of Appeals. On January 12, 1967, both respondent's and petitioner's petitions were denied by the Court of Appeals.

Statute Involved

Section 2 of the Sherman Act (15 U.S.C. 2) provides in pertinent part[1]:

> "Every person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce among the several States, . . . shall be deemed guilty of a misdemeanor, . . ."

Questions Presented

Sunkist presents four questions:

1. May product oranges produced in California and Arizona be a relevant market for purposes of determining the possible existence of a monopoly under § 2 of the Sherman Act where (a) product oranges have value only because they can be processed into products

[1] The District Court in Pretrial Order No. 1 ruled as a matter of law that Sunkist (and the Exchange Orange Products Co. and Exchange Lemon Products Co. who were original defendants with Sunkist) had complied with section 1 of the Capper-Volstead Act and consequently conspiracy in violation of sections 1 or 2 of the Sherman Act could not exist between Sunkist, Exchange Orange and Exchange Lemon (Cl. Tr. 1307-1310). In Pretrial Order No. 2, the District Court ordered the issues confined to whether Sunkist had a monopoly on product oranges grown in California and Arizona, whether it had illegally used such monopoly power or had attempted to monopolize such oranges and damages (Cl. Tr. 1359-60).

which are sold in a national products market; (b) California and Arizona produce only approximately 10% of the product oranges, the products from which are marketed in such national market; and (c) the price at which product oranges may be sold in California and Arizona is limited by the national products market?

2. Under such circumstances, what are the tests for determining the relevant market under § 2 of the Sherman Act where a derivative market is involved?

3. Can different tests be used to define a submarket which is proposed as the relevant market in a monopoly case so as to produce a market which is so narrow that it is not subject to monopolization?

4. Are the criteria for determining relevant market under § 7 of the Clayton Act necessarily the same as those under § 2 of the Sherman Act?

Sunkist's dominant question 1 (on which questions 2-4 are dependent) is based on its premise that "the price at which product oranges may be sold in California and Arizona is limited by the national products market." We do not believe such premise in any way affects the issues of relevant market. However, as mentioned *infra,* under Argument IV the premise is false being contradicted by substantial evidence that Sunkist's dominant control of product oranges produced in California and Arizona enabled it to control the price of product oranges produced in this area.

Statement

In Pretrial Order No. 1 the District Court ordered two trials. The first to cover the issue of liability and if respondent prevailed, the second to cover damages (Cl. Tr. 1307-1310). Trial was had before a jury from November 10, to November 30, 1964, and respondent (plaintiff below) rested. Petitioner (defendant below) without offering evidence moved for a directed verdict which motion was

granted. On March 2, 1965, final judgment was entered pursuant to the Court's order granting defendant's motion for a directed verdict (Cl. Tr. 1964-1966; 2093-2104; and 2110-11). In the District Court's "Memorandum and Order Granting Motion For Directed Verdict" the Court stated that there was no question but "that Sunkist dominated 70% of the citrus produced" in the California-Arizona area. But the Court further ruled (as stated in the Court of Appeals' decision) that:

> "The district court's granting of the directed verdict was premised upon the conclusion that the 'relevant market' was national rather than limited to California-Arizona, and that in light of this plaintiff had not shown evidence of an illegal monopoly" (Appendix, Sunkist's Petition, p. 7).

Substantially, all oranges marketed in the United States are grown in three areas, the California-Arizona area, Florida and Texas (R. Tr. 454). During the period involved in this action (May 15, 1958-January 31, 1962) Sunkist *admittedly* controlled approximately 70% of all oranges grown in the California-Arizona area which embraced approximately 67% of all such oranges diverted for the manufacture of orange products. Other small cooperatives controlled for their own use 18% of oranges grown in California and Arizona. The balance of such oranges (approximately 12%) represented those grown by independent growers and were in the main handled by the Morgan Ward Company.[2]

The product involved in the action is what are denominated "product oranges" (see Pretrial Order No. 2, *supra*).

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[2] These figures are based on defendant's admission in response to plaintiff's request for admission (see Answer to Request No. 7, Cl. Tr. 1370-1371). It was also supported by testimony of G. Holley of the Stanford Research Institute (R. Tr. 990-1020).

Size and appearance can determine whether particular oranges should be diverted to product use. *But that is not the only determining factor. Oranges are utilized for product use that could be sold as fresh oranges in order to maintain fresh orange prices* (Sunkist's manager, F. R. Wilcox, R. Tr. 951:16, 952:4, 966:2-8).

The market for product oranges (the purchasers) are manufacturers of orange products. In California, these included such manufacturers as Case-Swayne, General Foods Corporation, TreeSweet Products Company and Hyland-Stanford Corporation. These purchasers, as a practical matter, depended on product oranges grown in California and Arizona. Freight costs of transporting product oranges from Texas or Florida prevented use of such oranges by California manufacturers because they competed in the sale of orange products with manufacturers of orange products located in Florida and Texas.

Case-Swayne's President, Amos Swayne, testified:

> "Q. In what geographical area do you obtain the oranges for your business?
>
> "A. California and Arizona.
>
> "Q. Have you ever used oranges from Florida or Texas?
>
> "A. No, we have not.
>
> "Q. Can you tell the jury why you have not?
>
> "A. The cost of transporting whole fruit from either Texas or Florida freight-wise would be prohibitive. It is a long distance from either Texas or Florida to California and, basically, half of the weight of a pound of oranges is represented by the peel and the pulp and the seeds, and the other half basically—I say basically, half is represented by juice, so the cost of transportation would become prohibitive to move it from either Texas or Florida to California.
>
> "Q. Do you know of any other orange processing company making single strength juice or similar prod-

uct that has ever obtained their orange supplies other than from California or Arizona?

"Mr. Beardsley: You mean in this area?

"Mr. Henderson: In this area.

"The Witness: I do not.

"By Mr. Henderson:

"Q. May I conclude that you must depend upon your oranges grown in California and Arizona in order to continue your business?

"A. We definitely must." (R. Tr. p. 439-440:2)

When Sunkist's manager, F. R. Wilfox, was confronted with the question of whether manufacturers of orange products must, as a practical matter, depend on oranges produced in the California-Arizona area in order to compete with such manufacturers in Florida or Texas the Court interrupted answer, stating:

"The Court: There is no dispute about that, is there, Mr. Henderson? The testimony has been that it would be uneconomical to try to ship fruit into California or Arizona from Florida or Texas. You have already established that. You are just accumulating evidence now. There is no dispute about that." (R. Tr. 982:18-24). See also testimony of Robert McCracken, R. Tr. 86:4-20).

Argument

The Court of Appeals' decision is clearly correct and further review is not warranted.

I

The Court of Appeals mentions that, in advance of trial, it was the trial Court's position that the relevant product market was product oranges and the relevant geographic market California and Arizona, but at the close of Case-Swayne's case was persuaded that the relevant product market included orange juices and concentrates and that

the relevant geographic market was national (Appendix, Sunkist's petition, p. 13). The Court of Appeals most carefully and thoroughly analyzed the authorities on relevant market, applied them to the relevant facts and ruled that the District Court's conclusions were erroneous. (Appendix, Sunkist's petition pp. 7-17).

Although Sunkist questions the Court of Appeal's decision on revelant market, no where in its 40-page petition does it carry the torch on the District Court's conclusion on the relevant product and explicitly challenge the Court of Appeal's ruling that the relevant product was product oranges. Mayhap, this was by reason that "The market for raw products [product oranges in this case] is among the processors". (Appendix p. 15, Sunkist's petition). And under the teachings of the Supreme Court's decisions in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966), *United States* v. *Pabst Brewing Co.,* 384 U.S. 546 (1966) it could hardly be argued that product oranges did not constitute the relevant product in this case. What Sunkist repetitiously argues is that California manufactured orange *products* competed in *the product market* with Florida manufactured orange *products* (Appendix, Sunkist's petition pp. 7, 9, 17-21). But this unquestioned fact was (as is stated by the Court of Appeals, Appendix, Sunkist's petition p. 7) one of *Case-Swayne's complaints* in "that it was unable to purchase oranges for product use from Sunkist at a price that would enable it to compete with canned juice shipped in from Florida".

Despite Sunkist's vague contentions we discuss relevant market both product-wise and geographically.

As above mentioned, these were "Johnny come lately" issues with the District Court. Trial was had from November 10, 1964 to November 30, 1964, under the District Court's Pretrial Order No. 2 that the monopoly issues were confined

to *product oranges grown in California and Arizona* (Cl. Tr. 1359-60). During the trial, *Sunkist* reminded the Court that the relevant product had been defined as product *oranges* and the geographic market limited to *California and Arizona.*

> "Mr. Hufstedler: Now may I read the issue defined by the court in pretrial order No. 2?
>
> "The Court: All right.
>
> "Mr. Hufstedler: 'Did Sunkist have a monopoly of product oranges grown in the California-Arizona area?'
>
> *"There is no issue, your Honor, with respect to the products themselves."*

Sunkist presents no question that has not been authoritatively decided by this Court. In determining the relevant geographic market a proper test is the "geographic structure of supplier-customer relations." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963). The purchasers of product oranges were manufacturers of orange products. Consequently, the relevant geographic market is determined by whether such purchasers could as a practical matter obtain product oranges from suppliers outside of California and Arizona. *United States* v. *Philadelphia National Bank, supra; Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co.* v. *United States*, 337 U.S. 293 (1945); *United States* v. *Pabst Brewing Co., supra.*

Respecting the relevant product: It can hardly reasonably be argued that there was available to manufacturers of orange products other "products reasonably exchangeable" with product oranges for the manufacture of orange products. Particularly is this so when the evidence disclosed that California manufacturers of orange products had to rely on oranges grown in California and Arizona to compete with Florida manufacturers and as hereinafter mentioned

when Sunkist reduced their orange supplies and increased orange prices, they were driven from California. Even if (as was assumed by the Court of Appeals) product oranges have little value in their "raw state," as was stated by the Court of Appeals: "The market *for raw products is among the processors rather than the ultimate consumer.*" (Our emphasis) (Appendix, Sunkist's Petition, p. 15). The relevant product market was product oranges. *Brown Shoe Co.* v. *United States, supra; United States* v. *Grinnell Corp., supra; United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956); *United States* v. *Pabst Brewing Co., supra.*

II

Sunkist's suggestion in question 3 that the relevant market for product oranges (the manufacturers of orange products) is so narrow to be "not subject to monopolization" is unrealistic. A look at Sunkist's operations alone refutes such contention. Sunkist's multifarious orange products included juices, concentrates, blends, juice base, oil, pectin, pharmaceuticals and cattle feed (p. 5, Sunkist's Petition). The annual dollar value of product oranges controlled by Sunkist for the years involved ranged from $16 million to approximately $23 million (Plf's Exh. 97, R. Tr. 628-632).

Admittedly, the number of manufacturers of orange products was narrowed in California by Sunkist's elimination of such competitors as General Foods Corporation, Hyland-Stanford Corporation and forcing TreeSweet Products Co. to establish a plant in Florida to meet its California demand for orange products as is mentioned *infra,* point IV.

III

In question 4 Sunkist requests the Court to decide whether a different criteria should be applied for determining relevant market under section 2 of the Sherman Act than under section 7 of the Clayton Act.

With respect to the relevant product, this question has been authoritatively decided by the Supreme Court. *United States* v. *Grinnell Corp.*, 384 U.S. 563 at p. 573 (1966).

> "We see no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act."

It has long been settled that section 2 of the Sherman Act proscribing monopoly of "any part" of commerce has a geographic significance; and that a relevant geographic market exists under the Sherman Act *"where the purchasers cannot, as a practical matter, turn to suppliers outside their own area."* (Our emphasis) See *Standard Oil Co.* v. *United States*, 337 U.S. at p. 299, footnote 5 and cases there cited. Further, the Supreme Court has not drawn distinctions relating to geographic markets between the language of section 2 of the Sherman Act (making it unlawful "to monopolize, or attempt to monopolize . . . *any part of the trade or commerce*") and that of section 7 of the Clayton Act (proscribing certain mergers "in any section of the country"). *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States* v. *Philadelphia National Bank, supra; Tampa Electric Co.* v. *Nashville Coal Co., supra.*

IV

Sunkist does not challenge the decision of the Court of Appeals that "there was sufficient evidence from which the jury could find further that Sunkist engaged in monopolistic practices or an attempt to monopolize proscribed by section

2 of the Sherman Act." (Appendix, Sunkist's Petition, p. 17). But Sunkist attempts to distort the issues and applicable standards governing relevant market that have been carefully defined by the Supreme Court in the many decisions cited by the Court of Appeals. Sunkist resorts to incomplete, misleading quotations of testimony and irresponsible statements relating to monopoly issues. One of many examples of a quotation of part of a witnesses' testimony out of context so that the quoted portion indicates the exact opposite of the witnesses' testimony is Sunkist's quotation of the testimony of Morgan Ward at page 16 of Sunkist's petition:

> "Q. Is it your opinion, then, that the market conditions with respect to Florida product oranges had more effect on the price of product oranges in California than any one factor? A. They have effect on the overall United States. . . ." (*P. 16*, Sunkist's Petition).

The *complete* testimony of Morgan Ward in answer to the question above-quoted was as follows:

> "A. They have effect on the over-all United States. Then those who set prices on the fruit in California look at what is going on all over the Unted States, and at that time the prices were set in California by the leading growers, Sunkist set it, using all those things to do it, I assume. *But the price of by-products in this state has, ever since I have been in the business since 1934, been set by Sunkist. At one time it was called California Fruit Growers Exchange, and Sunkist at this time.*" (Our emphasis)

Sunkist *does* quote Morgan Ward's complete answer to the question on page 24 of its petition. But Sunkist accompanies it with the irresponsible statement: "The only testimony in the record designated to show that Sunkist

controlled prices of product oranges in California was that of Morgan Ward *in one answer.* (Our emphasis)

In addition to his testimony above quoted, Morgan Ward also testified:

"The COURT: May I ask a question here?

Mr. Henderson: Yes.

The COURT: This is preliminary to that. You were representing these independent growers.

The WITNESS: Yes, sir.

The COURT: You wanted to get as much money for their fruit as you possibly could.

The WITNESS: That's right.

The COURT: And so you sold the fruit at the highest price that you could obtain.

The WITNESS: That is true.

The COURT: All right. Now you can tell us how you obtained that price.

The WITNESS: *Well, in the citrus by-product business, we know that Sunkist is the largest, and the days when they set a price, we followed that price.*

Then when they put out bids, we found out what those bids were, and if it was 2 or 3 days before we found out what was accepted, we waited until we found out what the top bid was, and then we billed our customers retroactively back so that everybody in the citrus business were competitive.

Then when the Sunkist did not sell any fruit at all on any basis, then we would find out from their packing houses, we would talk to employees here and there and we would find out, Well, what do you think you are going to pay for by-products fruit?

Well, they would say, "from the powers that be in Sunkist, we are going to receive so and so.

Then we would go from there and arrive at a price we thought would be comparable so that all would be equal in price in the State of California. *That's the only way we could do it.* . . .

Q. Were you familiar with the price of other product orange suppliers during that period?

A. Yes.

Q. Did they generally follow the Sunkist price?

A. To the best of my knowledge, the whole industry did. . . .

Q. By and large did the prices of Sunkist become the prices of product oranges, California product oranges?

A. That is what I said. That's true." (R. Tr. 374:6-377:9)

Morgan Ward, who handled approximately all oranges of independent growers produced in the California-Arizona area was in the best position to know who controlled the price of product oranges in the area. His testimony alone was substantial evidence of Sunkists' control of product orange prices. But his testimony was corroborated by TreeSweet president Robert Bucheim:

"Sunkist is the largest, and the days when they set a price, we followed that price". (R. Tr. 374:10-21)

And by Robert McCracken:

"The COURT: The question is how did you individually fix the price, not somebody else; how did you tell the grower how much you would pay him for his fruit?"

The WITNESS: I heard what Sunkist estimated they were going to return, and that is the price we paid for independent fruit." (R. Tr. 123:15-125:3)

The above testimony of Robert Bucheim and Robert McCracken is neither mentioned or quoted by Sunkist.

An example of one of many irresponsible assertions by Sunkist in seeking to distort the relevant market issues appears on page 9 of its petition, i.e.:

"There was no evidence that Sunkist possessed the power to control prices or exclude competition."

This erroneous statement is repeated on page 12 and 24 of Sunkist's Petition.

We cite some of the evidence on these issues that Sunkist has overlooked:

(a) *Price Control*—The evidence of Morgan Ward (above quoted) who handled all the product oranges of independent growers refutes Sunkist's assertion. See also the testimony of Robert Buchheim and Robert McCracken above quoted.

(b) *Exclusion of Competitors*—Sunkist's [3] handling of oranges for product use was vertically integrated with dual distribution. It sold its orange products in competition with other manufacturers of orange products who relied upon Sunkist for their product oranges. (General Foods, R. Tr. 534:4-10; 549:12-550:3; Hyland-Stanford, R. Tr. 513:12 to 514:6; TreeSweet, R. Tr. 345:2-22; 706:13-25; Case-Swayne Co., R. Tr. 792:6-13; 823:3-17). California Valencia oranges are the principal oranges utilized for single strength product juice in California sold in competition with Florida products. (R. Tr. 486:22-25; 488:6-21) Sunkist by the device of maintaining the prices of California Valencia product oranges over prices of Florida product oranges, which contain more sugar solids, (R. Tr. 1195; 509:22 to 510:8) and limiting supplies available to manufacturers (R. Tr. 611-615:2) eliminated General Foods and Hyland-Stanford from California (General Foods, R. Tr. 544-548; 549-550; *999-999b* [4]; Hyland-Stanford, R. Tr. 513, 515, 528, 1081-1084).

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[3] In referring to Sunkist's handling of oranges, we include the functions of Exchange Orange Company before it was merged into Sunkist on October 31, 1958. Exchange Orange was a 100% owned subsidiary of Sunkist. (Cl. Tr. 1367-1368)

[4] Evidence contained in R. Tr. 999-999b is from a report prepared by G. Herbert Holley, economist, of the Stanford Research Institute "to advise . . . General Foods, whether they should continue with the processing plant in California" (R. Tr. 990-991; 1008:22 to 1009).

Sunkist forced TreeSweet to construct a plant in Florida to meet its California market for orange products. TreeSweet was a leader in the field, packing more single strength juices than anyone else in California (R. Tr. 705-708).

Sunkist's irresponsible assertions that it is not responsible for Case-Swayne's inability to obtain oranges (Sunkist's Petition, p. 35 *et seq.*) are refuted not only by the above-cited evidence but by other evidence mentioned by the Court of Appeals in ruling that Case-Swayne "made a prima facie case for the jury":

> "boycotting appellant [Case-Swayne] by refusing to sell appellant product oranges while selling to other processors; . . . preventing TreeSweet from delivering oranges TreeSweet had committed to appellant; . . . Sunkist's . . . admitted purpose to control all the oranges it could get and utilize all of them in its own manufacturing facilities; . . . preventing Placentia Orange Distributors from fulfilling its promise to sell appellant 5,000 tons of oranges in 1957; . . . policing the Sunkist system to punish violators of the Sunkist 'restrictive tying contracts'; . . . wrongful use of dual distribution by lowering single strength juice prices after competing manufacturers had purchased product oranges at prices established by Sunkist; . . . use of consignment contracts and its low 1956 bid (compared with its 1955 bid) to the Department of Agriculture." (Appendix, Sunkist's Petition, pp. 19, 21).

Conclusion

Sunkist's petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM H. HENDERSON,
W. GLENN HARMON,
by *William H. Henderson*

J. EDWARD JOHNSON,
RICHARD A. PERKINS.

(1483-7)